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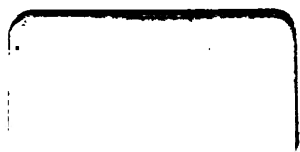
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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

C. P. POMEROY,
REPORTER.

VOLUME 141.

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ORGANIZATION OF SUPREME COURT.

[Constitution, article VI, section 2.]

SEC. 2. The Supreme Court shall consist of a chief justice and six associate justices. The Court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions hereinafter contained in relation to the Court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the Court to be heard and decided by the Court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a case to be heard in Bank.

If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the Court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the Court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the Court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

SUPREME COURT COMMISSIONERS.

[Statutes 1903, page 178.]

SECTION 1. The Supreme Court of the State of California shall, immediately upon the expiration of the term of office of the present Supreme Court Commissioners, appoint five persons of legal learning and personal worth as Commissioners of said Court. It shall be the duty of said Commissioners, under such rules and regulations as said Court may adopt, to assist in the performance of its duties, and in the disposition of the numerous causes now pending in said Court undetermined. The said Commissioners shall hold office for the term of two years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a Judge of said Court, payable at the same time and in the same manner. Before entering upon the discharge of their duties, they shall each take an oath to support the Constitution of the United States and the Constitution of the State of California, and to faithfully discharge the duties of the office of Commissioner of the Supreme Court to the best of their ability. The said Court shall have power to remove any and all members of said Commission at any time, by an order entered on the minutes of said Court, and all vacancies in said Commission shall be filled in like manner.

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

[Sas. No. 1006. Department One.—October 17, 1903.]

W. F. TURPEN, Respondent, v. TURLOCK IRRIGATION DISTRICT, Appellant, and J. A. WAYMIRE, Defendants.

INJURY TO LAND—SEEPAGE FROM CANAL OF IRRIGATION DISTRICT—CONSTRUCTION BY CONTRACTOR—STIPULATION FOR JOINT JUDGMENT—FINDINGS.—In an action for injury to plaintiff's land by seepage of water from the canal of an irrigation district, in the course of construction by a contractor sued jointly with the district, and for an injunction, where the defendants stipulated that if plaintiff recovered judgment at all it should be joint against both defendants, who reserved the right to adjust the responsibility between themselves thereafter, it cannot be objected upon appeal of the irrigation district that it was not responsible for the injury, because the contractor was an independent contractor, nor can the district complain of unnecessary findings made in accordance with the stipulation.

ID.—CONDEMNATION OF LAND—DAMAGE SUE FOR NOT INCLUDED—PLEADING—PROOF.—The damage allowed in a suit for the condemnation of land of plaintiff by the irrigation district, taken for the canal, could not have included or anticipated damage to land not taken from seepage due to faulty construction of the canal; and proof of the condemnation proceedings, if not pleaded, was inadmissible to show that such damage was included therein.

ID.—FINDINGS—FAULTY CONSTRUCTION OF CANAL—REPAIRS PENDING SUIT—DISSOLUTION OF INJUNCTION—DAMAGES—APPEAL.—Where the findings upon sufficient evidence show that the canal was not constructed in the manner suitable for such work, and that its bed where the seepage occurred was of very light and porous sand, through which the water easily percolates, and that such seepage could not be prevented without an artificial bottom, and that since the suit was commenced the defendants had remedied the seepage by repairs, whereupon the temporary injunction was dissolved, and

the court rendered judgment for damages found by the jury by reason of the seepage, and for costs, an order denying a new trial will not be disturbed upon appeal.

APPEAL from an order of the Superior Court of Stanislaus County. William O. Minor, Judge.

The facts are stated in the opinion of the court.

P. J. Hazen, for Appellant.

C. W. Eastin, for Respondent.

VAN DYKE, J.—The action was brought to recover damages for injuries to plaintiff's land caused by the seepage of water from the canal of the defendant corporation, and for an injunction. Special issues in reference to the damages caused by the seepage were submitted to a jury, and a verdict rendered in favor of plaintiff for the sum of \$475. Findings were also filed and judgment rendered in favor of plaintiff. The defendants moved for a new trial, which was denied, and the appeal is taken by said defendant corporation from the order denying a new trial.

It is contended by the attorney for appellant that the alleged damage occurred while the canal was in course of construction by the defendant Waymire, and that appellant was in no way responsible therefor, said Waymire being an independent contractor, and appellant complains of the finding to the contrary. But on the trial both counsel for defendants corporation and Waymire stipulated "that as between said defendants it was agreed that if plaintiff recover a judgment, it should be a joint judgment, reserving the right to adjust the responsibility as between themselves thereafter. Defendant district accepts responsibility for the management of the canal, so far as the plaintiff is concerned, and, so far as plaintiff is concerned, the district, defendant, does not set up that the defendant Waymire was an independent contractor, and the two agree that if the jury render a verdict in favor of plaintiff at all, it may run against both defendants, and as to whether Waymire was an independent contractor or an employee, they would determine that thereafter." It was not necessary for the court to find upon that subject, but the de-

fendant has no ground to complain, inasmuch as the finding is according to the stipulation and is therefore harmless.

It is further alleged by appellant that the canal was fully constructed across plaintiff's land at the time of a certain condemnation suit by appellant against the plaintiff, and the appellant upon this trial offered to prove the proceedings in said suit, and that plaintiff was fully compensated in that action for the damages claimed in this action, and it is claimed that the court erred in refusing to allow such proof and the findings by the court to the contrary. But the proceedings referred to were not pleaded by the appellant, and, further, damages caused by the seepage from faulty construction of the canal could not have well been anticipated, and were not included in the condemnation proceeding.

It is further maintained on the part of appellant that the canal was constructed in the manner usual and reasonable for such work under like circumstances, but the court finds to the contrary, and finds that the bed of the canal at the point where the seepage occurred "is composed of very light and porous sand, through which the water percolates very readily and easily, and the same is wholly unfit for the bed of a canal, and will not hold water, and the seepage of the water from the bed of the canal through said subsoil could not be prevented, without putting in an artificial bottom in said canal, as the same existed at the time of the commencement of this action." That said corporation realized that finding was supported by the evidence is quite evident from another finding by the court, to wit: "But that since the time of the commencement of this action, and the issuance and service of the injunction herein upon the defendants, certain repairs have been made in and upon the bed of said canal on the premises of plaintiff as aforesaid, from and by which the seepage alleged in plaintiff's complaint has been entirely or largely stopped." After the said repairs were made in the bottom of the said canal, the temporary injunction issued at the commencement of the action was dissolved, and judgment in favor of plaintiff was entered for the amount of damages caused by the seepage, as found by the jury, and for costs only.

The order appealed from is affirmed.

Angellotti, J., and Shaw, J., concurred.

[Sac. No. 912. Department One.—October 17, 1903.]

PACIFIC PAVING COMPANY, Appellant, v. NICHOLAS VIZELICH et al., Defendants; GEORGE FINKBOHNER, Respondent.

DISMISSAL OF ACTION—DELAY IN RETURN OF SUMMONS—MINUTE ORDER—FINAL JUDGMENT—APPEAL.—An order entered in the minutes of the court for the dismissal of an action for failure to return the summons within three years, under subdivision 7 of section 581 of the Code of Civil Procedure, is a final judgment, for the purpose of appeal therefrom.

ID.—ERRONEOUS DISMISSAL—APPEARANCE OF PARTY SERVED—PRESUMED AUTHORITY OF ATTORNEYS—DELAY OF ATTACK—ESTOPPEL.—The dismissal of the action for failure to return the summons was erroneous, and the moving party was estopped from urging it, as against the plaintiff, where such party was promptly served with summons, and attorneys promptly appear for him who are presumed to have had authority to represent him, and whose authority the plaintiff could not question, and who stipulated in his behalf with the plaintiff that the case should abide the result of another similar action, and whose authority to act for the moving party was not assailed by him until after the lapse of more than five years, during which time the plaintiff had delayed to return the summons on the strength of the appearance for him, upon which the plaintiff was entitled to rely.

ID.—SUFFICIENCY OF COMPLAINT—MOTION TO DISMISS—APPEAL.—The sufficiency of the complaint to state a cause of action is not available on a motion to dismiss the complaint, and cannot be considered upon appeal from an order granting the motion.

ID.—ORDER REFUSING TO SET ASIDE STIPULATION—APPEAL—RENEWAL OF MOTION.—An order refusing to set aside the stipulation is not appealable, and is reviewable only on appeal from the final judgment by the moving party, and the motion to set it aside may be renewed before such appeal is taken, after reversal of a judgment dismissing the action as to him.

APPEALS from two judgments of the Superior Court of San Joaquin County dismissing an action. Edward L. Jones, Judge.

The facts are stated in the opinion of the court.

James A. Louttit, and Gunnison, Booth & Barnett, for Appellant.

The acts of the attorneys who appeared for Finkbohner bound him until they were superseded, regardless of the question of actual authority, if no collusion appears. (*Blodgett v. Conklin*, 9 How. Pr. 442; *Lewis v. Sumner*, 13 Met. 269; *Bayley v. Buckland*, 1 Welsby, H. & G. 1; *Seale v. McLaughlin*, 28 Cal. 668.)

Elliott & Elliott, and J. B. Webster, for Respondent, Finkbohner.

The judgment of dismissal was properly granted, there having been no authorized appearance for the defendant Finkbohner. (*Modoc Land etc. Co. v. Superior Court*, 128 Cal. 255.) The statute is mandatory, and the judge had no discretion or jurisdiction to refuse the dismissal. (*Vrooman v. Li Po Tai*, 113 Cal. 302; *White v. Superior Court*, 126 Cal. 245.)

ANGELLOTTI, J.—The plaintiff instituted this action on December 2, 1893, to foreclose the lien of a street assessment upon a lot of land of which defendant Vizelich was alleged to be the owner, and in which defendant Finkbohner was alleged to claim some interest. During the pendency of the action, Finkbohner became the owner of the property by deed from Vizelich. Summons was issued, and was served on Finkbohner on January 13, 1894, but affidavit of such service was not made until December 19, 1899, and the summons was not returned and filed in the office of the clerk of the court until February 19, 1900. On January 22, 1894, what purported to be the demurrer of both defendants was filed, the same being signed by James H. Budd and J. E. Budd, as attorneys for defendant, and Gould & Baldwin, as counsel. On January 29, 1894, this demurrer was overruled and defendants were allowed twenty days to answer. On February 16, 1894, twenty days further time was allowed to answer by stipulation of counsel, and on April 28, 1897, the following stipulation was filed, viz.: "It is stipulated and agreed that the defendants in the above-entitled actions need not file an answer in said actions, but that the said actions shall abide the result of the action of the Pacific Paving Company against J. L. Mowbray, 5163, and whatever judgment may be finally entered in said action shall also be entered in each of the above-

entitled cases, whether the same be in favor of the plaintiff or defendant; and if in favor of the plaintiff, then in each case according to the prayer of the complaint.

“Dated April 23, 1897.

“Jas. A. Louttit, attorney for plaintiff. F. H. Gould, James H. and J. E. Budd, attorneys for defendants.”

In December, 1899, defendant Finkbohner, through his attorneys, J. B. Webster and L. W. Elliott, gave notice of a motion to vacate, set aside, and declare null and void the said stipulation, on the grounds that he had never employed either of the attorneys signing the same, or any other attorney or person, to make said stipulation, or do anything in this action on his behalf; and also to dismiss the action on the ground that the summons was not returned or filed within three years after the commencement of the action. He also, not waiving his motion, filed a demurrer to the complaint. The motion was in due time heard, and on March 12, 1900, the court made the following order, as appears from the minute entry set forth in the bill of exceptions, viz.:—

“It is by the court ordered as a disposition at one time of the three motions, 1, that defendant Finkbohner’s motion to set aside the stipulation herein be, and the same hereby is, denied; 2, that the plaintiff’s motion to enter the default of defendant Finkbohner for not answering be, and the same hereby is, denied; 3, that the defendant Finkbohner’s motion to dismiss said action as to himself be, and the same is hereby granted.” On September 12, 1900, the court rendered its decision in the case, finding that on April 28, 1897, “the parties . . . signed and filed” the stipulation hereinbefore set forth, and that judgment was finally entered in said action of Pacific Paving Company v. J. L. Mowbray, No. 5163, in favor of plaintiffs, and as a conclusion of law therefrom found that plaintiff was entitled to judgment as prayed for in its complaint. On the same day judgment, signed by the judge, was entered, adjudging that the action be dismissed as to defendant Finkbohner, and directing the sale of the land to satisfy the assessment, attorney fee, and costs.

The plaintiff appeals both from the order of judgment of March 12, 1900, and the judgment of September 12, 1900. It was held in *Marks v. Keenan*, 140 Cal. 33, that an order

dismissing an action under subdivision 7 of section 581 of the Code of Civil Procedure is, when entered on the minutes of the court, a final judgment within the meaning of the provisions of the code touching appeals, and should be treated as such for the purpose of appeal. An appeal having in this case been taken from the order or judgment of March 12, 1900, within the time allowed by the statute for appeals from final judgments, the action of the court thereon may be here reviewed. If that order was erroneous, the final judgment of September 12, 1900, from which an appeal was also taken, is also erroneous, for it was clearly in conflict with the findings and decision of the court, which were in favor of plaintiff as against both defendants, and directed the entry of judgment against both. The final judgment of September 12th was undoubtedly based upon the order of dismissal of March 12, 1900.

We are unable to perceive any ground upon which such order of dismissal as to Finkbohner can be sustained. The motion to dismiss was undoubtedly based upon the order of the court made March 12, 1900, granting Finkbohner's motion to dismiss said action as to him. That motion was based solely on the ground that the summons in said action had not been returned or filed within three years after the commencement of the action. The statute providing for a dismissal in such a case (Code Civ. Proc., sec. 581, subd. 7), further provides that "all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served." Admittedly, if Finkbohner appeared within three years from the commencement of the action, the action could not be legally dismissed for failure on the part of plaintiff to return and file the summons within the three years. It is urged by respondent that inasmuch as the dismissal could have been made on no other ground, the dismissal by the court was a finding by it that no appearance had been made by defendant. There was evidence on which the court was justified in finding that, although the attorneys who appeared for Finkbohner by filing a demurrer for him, obtaining time and stipulating on his behalf, had good reason to believe they were authorized to appear for him by reason of their em-

ployment by the committee of property-owners affected by the assessment for street work here involved, and acted in good faith in so appearing, they were never in fact authorized by Finkbohner to appear for him. Conceding that they had no authority to appear for him, the evidence was without conflict to the effect that, although personally served with summons on January 13, 1894, he never personally or by any other attorney appeared in the action until December 2, 1899, or "so far as the record shows, took any step to defend the same." It further showed without conflict that there was placed on file on his behalf, within ten days after service of summons on him, what purported on its face to be an appearance by him,—viz., a demurrer to the complaint signed by attorneys of the court (Code Civ. Proc., sec. 1014), whose authority to act for him the plaintiff had no ground to question. It further showed, without conflict, the stipulation already referred to, and also that, although said defendant had full notice of the action by reason of the personal service of summons on him, he never until the year 1899 caused any intimation to be given to any one that the attorneys who had appeared for him had not been in fact authorized by him so to do. Upon these facts the court was not warranted in finding, upon his motion, that there was no appearance made by said defendant, even although the attorneys had not been authorized to appear for him. There was such an appearance as plaintiff was entitled to rely on, and consequently refrain from returning and filing the summons that had been served.

In the absence of statutory requirement that the authority of an attorney shall be evidenced by writing, it is always presumed that an attorney appearing and acting for a party to a cause has authority to so do. (See 3 Am. & Eng. Ency. of Law, 2d ed., p. 375; *Turner v. Caruthers*, 17 Cal. 431; *Hayes v. Shattuck*, 21 Cal. 51; *Ricketson v. Comptor*, 23 Cal. 649; *San Luis Obispo v. Hendricks*, 71 Cal. 246; *Hunter v. Bryant*, 98 Cal. 247, 250; *Avery v. Maude*, 112 Cal. 565; *San Francisco Sav. Union v. Long*, 123 Cal. 113.) It was said by this court in *San Francisco Sav. Union v. Long*, 123 Cal. 113, that, "It is always presumed until the contrary appears, that an attorney is duly authorized to appear for and represent any parties for whom he assumes to act. This confi-

dence, which underlies all judicial action in this country, rests not only upon a belief in the honor and integrity of the attorney, but upon the fact that he is a sworn officer of the court." It was said by the supreme court of Massachusetts, in *Lewis v. Sumner*, 13 Met. 269, that when an appearance is entered for a party by a regular attorney, all parties have a right, *prima facie*, to regard him as the accredited representative of such party. This must, in the nature of things, be especially true when a defendant has been personally served with summons, and thus brought within the jurisdiction of the court, and no other appearance is made by or for him. By his omission to otherwise appear, having actual knowledge of the proceeding against him, he causes the plaintiff to more strongly rely upon the presumption as to the authority of the attorney who, in the manner provided by law, files an appearance for him, and therefore to refrain from filing the proof of service of summons, which is entirely unnecessary in cases where the defendant appears. We are satisfied that he cannot, under such circumstances, be heard to say, for the purpose of obtaining a dismissal of the action under subdivision 7 of section 581 of the Code of Civil Procedure, that he has not appeared in the action. That statute was designed for the benefit of defendants in actions, to relieve them from the assertion of stale demands and to insure proper diligence in the prosecution of asserted claims. That a defendant may expressly waive the benefit of its provisions was held by this court in *Cooper v. Gordon*, 125 Cal. 296, in which case summons was never served, and there had not been at the time of the motion for dismissal any appearance made by the defendant. In that case the parties had personally stipulated in writing that the plaintiff might take a judgment at any time for a stipulated amount, but this stipulation was not filed, and plaintiff, relying on the stipulation, failed to return the summons. It was held that this stipulation was intended in lieu of an answer, and was also a consent to the entry of the appearance of the defendant and the entry of judgment after the lapse of the three years limited by law, and although summons had not been returned and no appearance had been made within the three years, an order vacating the judgment of dismissal was affirmed. In the

case at bar a paper that plaintiff was entitled, and in fact bound, to treat as an appearance of Finkbohner had been filed within ten days after service of summons,—viz., a demurrer on his behalf signed by attorneys of the court. By reason of this purported appearance, which he, having full notice of the action, had failed in any way to repudiate, and relying thereon, plaintiff failed to make return of summons within the three years. Under such circumstances, a defendant will not be allowed to repudiate the appearance after the expiration of the three years, for the purpose of obtaining a dismissal on the ground that the summons was not returned within the three years, the statute expressly providing that the action may be prosecuted, if appearance has been made within three years, in the same manner as if summons had been issued and served.

It was further urged on oral argument and by supplemental brief, that the judgment of dismissal as to Finkbohner should be affirmed, for the reason that the complaint does not state facts sufficient to constitute a cause of action. It is true that under the decision of this court in *Buckman v. Hatch*, 139 Cal. 53, the complaint was fatally defective, in that it apparently showed that the resolution of intention for the doing of the street work for which the assessment was made did not specify the materials to be used in the construction of certain proposed culverts.

Such an objection to a complaint is not, however, available on a motion to dismiss an action, and cannot be considered on this appeal as tending to sustain the ruling of the court below. It is impossible for this court to say that the resolution of intention is correctly alleged, and it may be that the complaint can be amended so as to state a cause of action, and that the plaintiff should be allowed to amend.

Upon the going down of the cause, said defendant will of course be entitled to appear by his regularly authorized attorneys.

The judgment of dismissal and the order of dismissal of March 12, 1900, as to the defendant Finkbohner are reversed and the cause remanded.

Shaw, J., and Van Dyke, J., concurred.

A petition for a hearing in Bank having been made, the following opinion was rendered thereon on the 16th of November, 1903:

ANGELLOTTI, J.—The petition for a rehearing is denied. In denying the rehearing it is proper to further say that inasmuch as the order of the trial court refusing to set aside the stipulation was not appealable, and is reviewable only upon appeal from a final judgment against Finkbohner, we know of no reason why said defendant may not renew his motion to set aside the stipulation.

Shaw, J., Van Dyke, J., Beatty, C. J., and Lorigan, J., concurred.

[Sac. No. 1147. Department One.—October 17, 1903.]

MERCED SECURITY SAVINGS BANK, Respondent, v. JOHN H. SIMON and O. M. OLIVER, Executors, etc., of William W. Gray, Deceased, et al., Defendants; CROCKER-HUFFMAN LAND AND WATER COMPANY, Appellant.

FORECLOSURE OF MORTGAGE—SUBSEQUENT GRANT OF RIGHT OF WAY—RELEASES BY MORTGAGEE AFTER GRANT—MODE OF SALE—RIGHTS OF GRANTEE.—Where subsequent to the execution of a mortgage the mortgagor granted a right of way over the mortgaged lands to a third party, the mortgagee could not, subsequent to that deed, prejudice the owner of the right of way by releases of other portions of the mortgaged premises; and the grantee has the right upon foreclosure of the mortgage to have it explicitly ordered that that portion of the mortgaged premises not covered by the right of way should be first sold, and that the right of way should only be sold in case of deficiency.

APPEAL from a judgment of the Superior Court of Merced County. E. N. Rector, Judge.

The facts are stated in the opinion of the court.

James F. Peck, for Appellant.

T. C. Law, for Respondent.

VAN DYKE, J.—This action is against the executors of William W. Gray and others to foreclose a mortgage executed by the said William W. Gray to the plaintiff on certain premises in Merced County. It is alleged in the complaint that certain portions of the mortgaged premises—four tracts in number—have been released from the operation of the mortgage, and the prayer of the complaint is for a sale of the remaining portion of the land. Defendant Crocker-Huffman Land and Water Company filed an answer, in which it is alleged that subsequent to the execution of the mortgage in suit, said William W. Gray, the mortgagor, executed and delivered to said defendant Crocker-Huffman Land and Water Company a deed conveying a right of way over and across certain strips of land, being portions of the land covered by the mortgage, for the use and benefit of a system of canals and ditches maintained and operated by said defendant in Merced County, which deed was properly acknowledged and recorded, and it is alleged in said answer that at all times thereafter said plaintiff had notice and knowledge of the execution and delivery of the same; that subsequent to the execution of said deed of said right of way, and without the consent of the said corporation defendant, the grantee therein, the plaintiff made, executed, and delivered the releases mentioned and specified in the complaint; that about nine-tenths of the land described in the right of way in said deed to the said corporation defendant is not included in the lands covered by said releases. The court sustained a demurrer to said answer interposed by the plaintiff, and entered a decree of foreclosure according to the prayer of the complaint. The appeal by the corporation defendant is upon the judgment-roll.

The main contention on the part of the appellant is, that, as a grantee of the mortgagor of the right of way in question, said defendant had the right to have the portion of the mortgaged premises not covered by said right of way first sold, and that the mortgagee, the plaintiff herein, could not, subsequent to the date of the defendant's deed, release portions of said mortgaged premises so as to prejudice the right of the said defendant, the appellant herein. In this contention the appellant is clearly right, and is supported by authorities. (Civ. Code, secs. 2899, 3433; *Kent v. Williams*, 114

Cal. 537; *Woodward v. Brown*, 119 Cal. 283.¹) It is true, as claimed by the respondent, that under the decree as rendered the commissioner appointed by the court to make the sale might proceed to sell in portions instead of as a whole, reserving the portion claimed by appellant, and only sell that if the other portions did not sell for sufficient to satisfy the claim. But this right might be disputed, or the sale might under the decree be for the whole of the premises in gross. At any rate, the appellant was entitled to have it clearly expressed in the decree so it would be put beyond dispute or question. The answer stated facts sufficient to warrant the court in framing its decree so as to protect the appellant in case the remainder of the property covered by the mortgage should be sufficient to discharge the debt secured thereby to the plaintiff.

For the reasons stated the decree of foreclosure and sale should be so modified that the mortgaged premises, other than the right of way in question, or so much thereof as may be necessary to satisfy plaintiff's judgment, should be first sold, and that said right of way should be sold only in case the other portions of the mortgaged premises do not sell for a sum sufficient to satisfy plaintiff's judgment with interest and costs; and it is so ordered.

Shaw, J., and Angellotti, J., concurred.

Hearing in Bank denied.

[Sac. No. 1002. Department One.—October 17, 1903.]

DELIA HALL, Appellant, v. FRANCIS CAYOT, Executor,
etc.. of Phillip Doray, Deceased, Respondent.

ESTATES OF DECEASED PERSONS—CLAIM TREATED AS REJECTED—ALLOWANCE PENDING SUIT—JUDGMENT FOR COSTS.—Where a claim upon a note of a deceased person was treated as rejected under the statute, and pending action thereon was approved and filed as an allowed claim, a judgment for costs is the full extent of relief to which plaintiff was thereafter entitled. A judgment upon the claim could have no greater effect than that of an approved claim.

LD.—REJECTED NOTE—SECURITY—UNINDORSED STOCK—CERTIFICATE OF SECRETARY—EQUITABLE LIEN—ORDER OF SALE AGAINST EXECUTOR.
—Where the note of a decedent was intended to be secured by his delivery to the payee of an unindorsed certificate of stock standing upon the books of a corporation in his name, which intention was evidenced by a certificate of the secretary of the corporation indorsed thereon, stating the object of the delivery, such delivery created an equitable lien upon the stock, which was good and enforceable as between the parties. In an action upon the rejected note and security against the decedent's executor, the plaintiff is entitled to enforce both the note and the security, and to have an order of sale of the stock as against the executor, who occupies the same position which the decedent would have occupied had he lived.

APPEAL from a judgment of the Superior Court of Plumas County. C. E. McLaughlin, Judge.

The facts are stated in the opinion of the court.

Goodwin & Webb, for Appellant.

G. G. Clough, for Respondent.

ANGELLOTTI, J.—This is an action upon two claims against Phillip Doray, deceased, which were duly presented for allowance to the executor of his will, and which, because of the neglect and failure of such executor to indorse his allowance or rejection thereon within ten days after such presentation, plaintiff elected to consider rejected.

One of the claims was based upon a promissory note of the deceased. The action was commenced on the twenty-fourth day of May, 1900, and on the next day the said claim, having been allowed by the executor, was delivered by him to the judge, allowed by him, and on May 26, 1900, filed with the clerk of the court. The allowance of the claim is alleged by the answer, and the allegation is found to be true by the court. The other claim was also based upon a promissory note, the same being for \$3,200, which was given by deceased to plaintiff for a former note for \$2,669 and interest, given by deceased to the husband of plaintiff, who afterwards died, and from whom plaintiff had acquired the note as heir to his estate. At the time of giving such original note deceased delivered to the payee named therein a certificate for nineteen hundred shares of the capital stock of the Pacific

Gold Mining Company, as collateral security for the payment of the note, said certificate then bearing the following indorsement, viz. :—

“\$2669.00.

“The within nineteen hundred (1900) shares of stock are hypothecated to secure the payment of a certain promissory note, made and executed the 13th day of September, A. D. 1886, by Phillip Doray, to Robert Hall, for the sum of two thousand six hundred and sixty-nine dollars, due July 1, 1888. John K. Wall, Secretary,”

said Wall then being the secretary of the corporation. Plaintiff's husband retained said note and the said certificate of stock to the time of his death, when plaintiff succeeded, as his heir, to said note and to the possession of said certificate of stock, and when deceased executed the \$3,200 note, he left with plaintiff the certificate of stock, to be held by her as collateral security for the payment of said note.

There was never any writing or memorandum between the deceased, and either plaintiff or her husband as to said collateral security, or showing the purpose for which the certificate was delivered by deceased, except the indorsement already recited, signed by the secretary of the corporation, and neither the transfer nor anything tending to show that the certificate was held by plaintiff or her husband as collateral security or otherwise was ever entered upon the books of the corporation.

The foregoing facts are shown by the findings and such allegations of the complaint as are admitted by the answer. The trial court decided as to the first claim that, as the claim had been allowed after the commencement of the action, and the plaintiff thereby secured in all her rights, she was not entitled to judgment therein. As to the second claim, it decided that plaintiff was not entitled to a lien upon the certificate of stock, or the shares represented thereby, or a decree of sale therefor, but that she was entitled to judgment thereon for \$4,441.15, and interest from May 12, 1900, and her costs of suit, payable in due course of administration.

Judgment was entered accordingly, and plaintiff appeals upon the judgment-roll from that portion of the judgment denying her relief on the first claim, and from that portion thereof adjudging that she has no lien on the certificate of

stock or the shares represented thereby, and adjudging that she is not entitled to judgment directing the sale thereof to satisfy her demand. No brief has been filed by counsel for respondent, and we are therefore without the benefit of his views on the questions presented by this appeal.

1. As to the first claim, the judgment was not erroneous. The sole object of an action upon a rejected claim for money is to place it among the allowed claims against the estate. A judgment rendered against an executor or administrator upon any claim for money against the deceased only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge (Code Civ. Proc., sec. 1504), and such a judgment is no more effectual as an estoppel than an allowance of the claim would be, for it can be contested by the heirs on the settlement of an account in the same manner as a claim allowed by the executor or administrator and judge can be contested. (Code Civ. Proc., sec. 1636; *Estate of More*, 121 Cal. 635.) It having been found, in accordance with the allegations of the answer, that the claim had been regularly allowed, approved, and filed after the commencement of the action, the plaintiff was not entitled to an additional allowance thereof, and consequently was not entitled to judgment thereon, except possibly for her costs, which were awarded her.

2. The action of the trial court in adjudging that plaintiff has no lien upon the certificate of stock, or upon the shares of stock represented thereby, to secure the note on which the second claim is founded, and in refusing her an order for the sale thereof, was undoubtedly based upon the fact that there was no written transfer of the stock on the part of deceased, and no transfer in the manner provided by section 324 of the Civil Code. That section provides that shares of stock are personal property, "and may be transferred by indorsement by the signature of the proprietor, his agent, attorney, or legal representative, and the delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by whom and to whom transferred," etc. In this case there was no delivery of the possession of the stock other than such as was accomplished

by the mere delivery of the certificate, with the indorsement of the secretary of the corporation as to the purpose thereof.

It is well settled in this state by decisions construing this statutory provision that the entry upon the books of the corporation is not essential to the validity of the transfer, except as to purchasers and transferees "in good faith, for value and without notice." (*Spreckels v. Nevada Bank*, 113 Cal. 272;¹ *Farmers' Bank v. Wilson*, 58 Cal. 600; *Winters v. Belmont Min. Co.*, 53 Cal. 428; *People v. Elmore*, 35 Cal. 653.) The rights of any such third parties not being here involved, the provision of the statute as to entry on the books of the corporation is not applicable, and the finding thereon is immaterial.

There remains to consider the effect of the absence of indorsement by signature, or other writing signed by the owner of the stock. In considering this question it must be borne in mind that the defendant executor occupies the same position that the deceased would have occupied had he lived, and that there is no question in the case as to the rights of any third party. The intent of the deceased to hypothecate the shares of stock as collateral security is very clearly shown by his delivery of the certificate therefor, with the certificate of the secretary of the corporation, indorsed thereon, which certificate fully stated the object of the delivery, and which he, by his delivery, practically adopted as his own statement.

It appears to be well settled that incorporeal property, such as shares of stock in a corporation, cannot, technically speaking, be pledged without a written transfer of title or its equivalent. The theory underlying this rule is, that as such property,—viz., the shares of stock, as distinguished from the certificate therefor, which is but the muniment or evidence of title of the holder to a portion of the property of the corporation—is incapable of manual delivery, and as delivery of possession is essential to the validity of a pledge, a delivery of the certificate without a transfer in writing which will enable the holder to make a transfer of the stock to his own name on the books of the corporation is not a complete delivery, for it does not place the stock in the full control of the pledgee. While the authorities generally recognize the neces-

¹54 Am. St. Rep. 348.

sity of an indorsement or other writing to effectuate a transfer of the title to the share, and to create a valid pledge, it will be found upon examination that the mere delivery, by way of pledge, of the certificate without indorsement is acknowledged by the various text-writers to have been held to vest in the pledgee an equitable title to the shares, which may be enforced *as between the parties*. (Cook on Stocks and Stockholders, sec. 465; Jones on Pledges and Collateral Securities, sec. 152; 18 Am. & Eng. Ency. of Law, 1st ed., 611.) The various cases cited to support the doctrine enunciated as to the necessity of a writing to create a valid pledge will be found to be cases where the rights of third parties were involved. (See *Cumming v. Prescott*, 2 Younge & C. 488; *Nisbit v. Macon Bank etc. Co.*, 12 Fed. 686; *Wagner v. Marple*, 10 Tex. Civ. App. 505.) The decisions in *Cumming v. Prescott*, 2 Younge & C. 488, and *Wagner v. Marple*, 10 Tex. Civ. App. 505, both recognize the doctrine that where there is a delivery of the certificate with the clear intent thereby to pledge the stock, an equitable right is created in the person to whom the delivery is made, which may be enforced in equity, as between the parties. (See, also, *Rice v. Gilbert*, 173 Ill. 349.) In no case that we have been able to find, where the controversy was between the original parties, and the rights of third parties had not intervened, has a contrary doctrine been enunciated. The precise question appears never to have been decided by this court. In some of the cases to be found in our reports it is apparent that there was nothing beyond a mere delivery of the certificate, but the question in each of these cases was as to the rights of third parties, and in the case of *Brewster v. Hartley*, 37 Cal. 15,¹ the question was not involved.

We can see no reason why the well-established rules "that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an *imperfect attempt* to create a mortgage, or to *appropriate specific property to the discharge of a particular debt*, will create a mortgage in equity, or a specific (equitable) lien on the property intended to be mortgaged" (*Daggett v. Rankin*, 31 Cal. 321; *Higgins v. Manson*, 126 Cal. 467²) is not applicable to the case at bar. Mr. Pomeroy, in his *Equity Jurisprudence*, says that a merely verbal

¹ 99 Am. Dec. 237.

² 77 Am. St. Rep. 192.

agreement may create such a lien on personal property, enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice; and that equity looks at the final intent and purpose rather than the form, and if the intent appear to pledge certain property as security for an obligation, the lien follows. (Pomeroy's Equity Jurisprudence, secs. 1235-1237.) There was here a clear attempt to hypothecate the shares of stock represented by the certificate delivered to the creditor as security for the note. The debtor undoubtedly intended, in placing the certificate of ownership of his shares in the possession of his creditor, to pledge these shares as security for the performance of his obligation, and the creditor received the certificate with the understanding that the shares were to be retained as such security. If the attempt to appropriate these shares as such security was imperfect by reason of the absence of indorsement or other writing signed by the debtor, equity will, in the absence of intervening rights of third parties, looking at the intent rather than the form, "treat the subject-matter as to collateral consequences and incidents in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been." (*Daggett v. Rankin*, 31 Cal. 321.) It will, as between the parties, treat the property as pledged, and allow the creditor to enforce in this proceeding the lien attempted to be created. (*Higgins v. Manson*, 126 Cal. 467.¹)

We are of the opinion that upon the findings of fact the plaintiff should be held entitled to a lien upon the shares of stock evidenced by the certificate and to an order of sale thereof to satisfy the claim embraced in her second cause of action.

As to the first cause of action, the judgment is affirmed. As to the second cause of action, the portion of the judgment appealed from is reversed, with directions to the court below to enter judgment in accordance with the views herein expressed.

Shaw, J., and Van Dyke, J., concurred.

¹ 77 Am. St. Rep. 192.

[L. A. No. 1144. Department Two.—October 17, 1903.]

WILLIAM M. ROBERTS, Respondents, v. GEORGE H. KRAFTS et al., Appellants.

WATER-RIGHTS—GRANT OF RIGHT TO DEVELOP WATER—COVENANT AGAINST DIMINUTION—ACTION FOR BREACH—INSUFFICIENT DEFENSE.

—In an action by a grantee of the defendants of the right to develop water on defendants' land for use on plaintiff's land, in the sub-surface waters of a creek passing through defendants' land, to recover damages for breach of the covenant by the defendants that if the rights owned by the plaintiff were interfered with by a contemplated diversion of the flow of the stream by the defendants, or their successors or assigns, through a stone ditch above defendants' land, the defendants would grant him a perpetual right to the amount of diminution thereby effected, not exceeding ten inches of water,—an answer that the owners of the stone ditch had the right to the surface flow of the water, and that the diversions complained of as diminishing plaintiff's rights, were made by defendants' grantees by the permission of such owners, constituted no defense to the action upon the covenant made by the defendants, and was properly stricken out.

ID.—DEVELOPMENT OF WATER—CONTRACT—APPROPRIATION.—Under a grant to plaintiff of the right to enter upon defendants' land and "develop any and all water thereon by means of cuts, tunnels, or otherwise," and convey them to plaintiff's land, where the plaintiff did, by means of tunnels and cuts, concentrate and accumulate the waters diffused through a saturated mass of sand, gravel and boulders, constituting the sub-surface flow of a creek on defendants' land which was the only water contemplated by the grant and the covenant made by defendants, such acts constituted a development of the water as provided in the contract, and was also a development of water as generally understood with reference to procuring, controlling, and appropriating subterranean waters.

ID.—ESTOPPEL OF DEFENDANTS—RIGHTS OF OTHER PARTIES.—Under the terms of the deed and agreement between defendants and plaintiff, under which defendants granted and confirmed the right of plaintiff to the waters developed on his land, and covenanted against diminution thereof, the defendants are estopped from claiming that the waters granted by them, and developed and appropriated by the plaintiff did not belong to them, but to third parties having rights below their land.

ID.—CHANGE OF POINT OF DIVERSION FROM STONE DITCH—LIABILITY OF DEFENDANTS UNDER CONTRACT.—The fact that the grantees of the defendants, after diverting the water through the stone ditch as proposed in the contract, subsequently changed the point of diver-

sion to a point above plaintiff's cuts, ditches, and tunnels, is not material to the liability of the defendants under the contract to indemnify plaintiff against loss by diminution of the water to the extent agreed. The gist of the covenant was the diversion of the waters of the creek by the defendants, not to be interfered with by the plaintiff, for which non-interference defendants covenanted that he would be protected against damage.

Id.—SPECIAL DAMAGE—INJURY TO TREES AND FRUIT CROP.—Where the court found that defendants knew when the contract was made that the ten inches of water contracted for had a peculiar value to plaintiff, inasmuch as his land and orchard were of little value without it, and the orchard was in bearing when the breach of covenant was committed, and there was no other source from which plaintiff could obtain water for irrigation, the court was warranted in making an award of special damages to the extent of the injury suffered to the trees and crops by reason of the failure to furnish the water as agreed.

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order denying a new trial. D. K. Trask, Judge presiding.

The facts are stated in the opinion of the court.

Curtis & Curtis, and E. R. Annable, for Appellants.

The contract for the development of the water on defendants' land was an actionable wrong against the zanja-owners, and could not confer a right. (*Holman v. Brown*, 1 Cowp. 341; *Arnold v. Clifford*, 2 Sum. 238.) Improper damages were allowed for the loss of crops. (*Pallett v. Murphy*, 131 Cal. 192; *Wallace v. Ah Sam*, 71 Cal. 197.¹)

Byron Waters, James Hutchings, and Waters & Wylie, for Respondent.

There was a development of water as contemplated by the deed and contract, and within the right of appropriation of developed water. (*Vineland Irr. Dist. v. Azusa Irr. Co.*, 125 Cal. 495; *Beck v. Pasadena etc. Water Co.*, 130 Cal. 53; *Yarwood v. West Los Angeles W. Co.*, 132 Cal. 207; *Churchill v. Maviana Rose*, 136 Cal. 576.) The defendants were estopped by their deed and contract from disputing plaintiff's rights. (Bigelow on Estoppel, 4th ed., 355; *Gordon v. City*

of *San Diego*, 101 Cal. 522.¹) The damages to the orchard were properly allowed. (*Mabb v. Stewart*, 133 Cal. 559.)

LORIGAN, J.—This is an action to recover damages for breach of a covenant relative to certain water-rights. Plaintiff obtained judgment for nine thousand dollars, and defendants appeal from the judgment and from the order denying their motion for a new trial. The general features of the case, as gathered from the findings, are that prior to 1887, and up to the commencement of this action, plaintiff was the owner of one hundred acres of land in San Bernardino County, in proximity to a stream known as Mill Creek, which tract was, to a large extent, set out in orchards, and plaintiff and his family resided upon the premises.

Mill Creek is a natural, innavigable stream of water in said county, rising in the San Bernardino Mountains, and flowing through and emerging from Mill Creek Canyon upon a portion of the San Bernardino Valley, until it empties into the Santa Ana River. The bed of said creek, where the same emerges from said canyon, which is about a mile above a certain forty-acre tract through which it flows (which tract will presently be more particularly referred to), is composed of sand, gravel, and boulders, extending down a considerable depth, and is at all times capable of a ready flow of water through the same underneath the surface of said creek, and said stream from the point where it emerges from said canyon, until it empties into the Santa Ana River, has a surface and subterranean flow, constituting a watercourse, having a known and well-defined channel and continuous flow of water therein.

On August 19, 1892, the defendants granted to plaintiff the right to enter upon said certain forty-acre tract of land,—the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 13, T. 1 S. etc.—below the point of diversion hereafter referred to, “and develop any and all water thereon by means of cuts, tunnels, or otherwise.” Prior to said grant plaintiff had entered on said tract and appropriated six and three-fourths inches of water of the subterranean flow of said stream (to which he had acquired a prescriptive right), and by means of a pipe-line,

¹40 Am. St. Rep. 73.

conveyed it onto his said one-hundred-acre tract, and used it for irrigation, household and domestic purposes.

On August 22, 1892, the defendants, who were the owners in fee of the forty-acre tract above referred to, subject to said right of plaintiff to develop water thereon, and the plaintiff, executed an agreement, the material portions of which are: "That, whereas, the party of the second part [plaintiff] is the owner of certain water-rights, and the right to develop water on" said forty acres, "and the parties of the first part [defendants] contemplate diverting the flow of the water of the stream known as Mill Creek," in or near sections 13 and 14 in said township "by diverting said water from the natural channel of said stream, at or near the upper end of the stone ditch built and owned by the owners of Mill Creek Zanja, and running the same through said stone ditch. Now, in consideration of," etc., "the said parties of the first part do hereby covenant, promise, and agree to and with the party of the second part that, if by the diverting of said water of Mill Creek, as aforementioned by them, or their successors, or assigns, the water-right now belonging to the party of the second part, or any water that he may hereafter develop on the said 'forty-acre tract,' is diminished within seven years from date hereof, that they will furnish him with a perpetual water-right, conveying an amount of water equal to the amount so diminished, and deliver the same into his pipeline, flume, or ditch," on said forty-acre tract, "provided, that the total amount to be furnished under this agreement shall not exceed ten inches of water. In consideration of the above agreements . . . the party of the second part promises and agrees that he will not hinder, impede, or delay the changing of the course of the water as herein contemplated." When said agreement was executed defendants claimed to own the right to divert the waters of said Mill Creek, in the manner and at the points indicated in it, below said forty-acre tract, and convey the full flow to a point over a mile below said forty-acre tract, and in December, 1892, conveyed such ownership or right to divert said water to the Redlands Electric Light and Power Company, a corporation; that between August 22, 1892, and June 1, 1896, plaintiff, by means of cuts, ditches, and tunnels, made and excavated on said forty-acre tract, about the middle thereof, developed and intercepted

a large quantity of the subterranean flow of said water, and of the water percolating through the sand, gravel, and boulders of said tract, from both the surface and subterranean flow of said creek to the extent (with the six and three-fourths inches theretofore appropriated) of fifty-four and three-fourths inches, and conveyed the same to his hundred-acre tract, and beneficially used it for agricultural, domestic, and household purposes; that in 1893, by virtue of the conveyance from defendants, the said electric company entered upon the creek at the northeast corner of said forty-acre tract, and above plaintiff's cuts, ditches, and tunnels, and by means of a pipe-line constructed in its bed, diverted all the surface water flowing in said creek, and conveyed it about a mile below said forty-acre tract, to a point some four hundred and fifty feet lower in elevation than said tract, and used it for electrical purposes; that in 1896, after all of the plaintiff's developments were made, the company extended its pipe some thirty-six hundred feet farther up stream, and took all the surface water from this last point for the use above indicated; that before the construction of said pipe-line in 1893, or its extension in 1896, and from time immemorial, the surface flow of said creek was sustained by a saturated mass composed of sand, gravel, and boulders beneath it, and that said surface flow had always wasted and been diminished by wastage into said sand, gravel, and boulders, and constituted a subterranean stream, which, to the extent of upwards of a hundred inches, flowed in said subterranean channel between the points of diversion by the company and the location of plaintiff's tunnels, shafts, and ditches, down and through said forty-acre tract; that none of the water developed and used by plaintiff had been theretofore appropriated or used by any person whatever, but had theretofore been allowed to run to waste and percolate through the soil until developed and saved from waste and devoted to a useful purpose by plaintiff; that the diversion by the company had so diminished the subterranean flow in said forty-acre tract that the amount of water developed by plaintiff was reduced forty-four inches and upwards and that the flow thereof is but 4.94 inches; that in 1889 plaintiff demanded, under the said agreement, that the defendants deliver him said ten inches of water agreed for, which they refused to do. The court found, in addition to the above facts, that the one-hundred-acre tract of plaintiff

was practically arid land, and his orchard of little value without irrigation, and that by the failure of defendants to furnish the water as agreed, the fruit-trees in said orchard were injured and the fruit thereon was rendered valueless, for which special damages of one thousand dollars were awarded, in addition to eight thousand dollars, which the court found was the value of the perpetual flow of ten inches of water.

As grounds of reversal, appellants insist that no water was developed on the forty-acre tract, as provided in the contract; that no water was diverted by them, or their successors, at the place, and by the means, described in the contract, and that improper damages were allowed.

Defendants also insist that the court erred in striking out parts of their amended answer.

While in the transcript, it appears that specifications concerning the insufficiency of the evidence to sustain certain of the findings are made, no point in regard to any of them is urged in appellants' brief, and we take it, that reliance is placed solely upon the grounds above indicated, and we shall limit ourselves to a consideration of them alone. Disposing first of the alleged error in striking out portions of the amended answer: In this answer which was offered during the trial of the case, it is set up that when the grant to plaintiff was made by them, and the contract entered into with him was executed, the surface waters of Mill Creek were, and for a long time had been, diverted through a certain ditch, known as the Mill Creek Zanja, and that the Redlands Electric Light and Power Company made the diversions complained of through the permission of the owners thereof.

We cannot see how this would constitute any defense under the contract. There is no question but that the electric company succeeded to the rights which the defendants claimed to possess, to divert these waters for electrical purposes, when the contract was executed. The contract did not provide that the plaintiff was to establish his right against all claimants to the waters he might develop under defendants' grant, and the right to do which was confirmed by recital in the agreement, before he could have a right of action against defendants upon it. Under the terms of the contract it is of no moment whether the zanja-owners, or defendants, had the better right to appropriate the water. Defendants claimed to

own the right, and recited in the contract that they contemplated diverting the waters of the zanja, and to run the same through that ditch. They contracted that if a diversion by them, or their successors in interest, damaged plaintiff, they would indemnify him in the way provided for in the contract. It was not a matter under the contract as to how the company acquired the right to divert the stream—whether from defendants or some third person, or from both—but whether, in exercising its right of diversion, plaintiff was damaged. If he was so damaged, defendants are bound by their contract as it is written, and in accordance with the fact, and the defense interposed could not avail them.

Coming now to the merits of the appeal:—

It is insisted, first, that there was no water developed by the plaintiff, as provided in the contract. We do not discover the slightest ground for this claim. That the plaintiff did, by means of tunnels and cuts, concentrate and accumulate the waters diffused through the saturated mass of sand, gravel, and boulders constituting the sub-surface flow of Mill Creek, and convey them to his home premises for general use, there can be no question. This was not only a development, but it was the exact method of development, and the waters to which it should apply, as specified in the conveyance of August 19, 1892, by the defendants to plaintiff, of the right to enter the land, and “develop any and all waters thereon by means of cuts, tunnels, or otherwise.” It was equally this development which all the parties had in mind, when, in the agreement of August 22, 1892, they recited that the plaintiff was the owner of certain water-rights, and the right to develop water on this forty acres. And it was the possible loss of the waters so developed, by the diversion of Mill Creek, that they had in mind. They certainly could have had no other, because there is no pretense that any other waters existed on the tract, except this subterranean flow.

It was equally a development, as generally understood, with reference to procuring, controlling, and appropriating subterranean water. In *Vineland Irr. Dist. v. Azusa Irr. Co.*, 126 Cal. 495, the court says “We therefore hold it to be the law, and we think it to be a moderate and just exposition thereof, that one may, by appropriate works *develop* and secure to useful purposes the sub-surface flow of our streams,

and become, with due regard to the rights of others in the stream, a legal appropriator of water by so doing. . . . If, upon the other hand, one can by *development* obtain subterranean waters without injury to the superior rights of others, clearly he should be permitted to do so." (*Beck v. Pasadena Water Co.*, 130 Cal. 53; *Yarwood v. West Los Angeles Water Co.*, 132 Cal. 207; *Churchill v. Maviana Rose*, 136 Cal. 576.) Under this same head counsel for appellants discuss, quite generally, the proposition that the subterranean waters so developed by plaintiff were not subject to development or appropriation, as they were part of the Mill Creek stream, which many years before plaintiff entered on this forty-acre tract at all, had been diverted and appropriated some distance below it, through a ditch, and was still being diverted and used. Assuming this to be true, still under the terms of the deed and agreement between defendants and plaintiff we cannot see how any advantage can be taken of that fact. This is only under another phase of the question attempted to be presented under that portion of the amended answer stricken out, and what was said concerning it applies here. Aside from the finding of the court that the appropriation by plaintiff was the only appropriation made of these waters (which under *Vineland Irr. Dist. v. Azusa Irr. Co.*, 126 Cal. 495, he could make) still, aside from this, the defendants, by their deed and agreement, are estopped from asserting that plaintiff did not have title to the waters developed by him. They granted him the right to develop all the waters on the tract, without reservation or limitation, and cannot be heard now to say that some of the waters which he did develop were not waters which they granted him the right to develop, but which belonged to some one else. They cannot go behind their deed to attack the right to these waters, which they purported to convey, and the ownership of which in the contract they recognized in the plaintiff.

Appellants' second point is, that no water was developed at the place and by the means described in the contract. Their particular claim is, that the diversion of which plaintiff complains was not made at the upper end of the stone ditch mentioned in the contract, but at a much farther point up the stream. We do not think the particular point of diversion is of controlling or any importance. The fact is, that the first

diversion made by the Electric Light and Power Company, as successors to the defendants, was above the upper end of the stone ditch, and the diversion farther up the stream was not made by it until 1896. In insisting on this point we think appellants are attempting to place too strict and literal a construction on the contract, one which certainly is not in harmony with its general terms, or its particular object, or the purposes they had in view, and which is calculated to substitute the manner or means of diversion for the fact of diversion, which was the important matter in the contract. While the recital in the agreement is, that the defendants contemplate diverting the flow of the water of Mill Creek "by diverting said water from the natural channel of said stream at and near the upper end of the stone ditch . . . and running the same through said ditch," this is, nevertheless, only a recital and not part of the covenant. It is simply the declaration of a general purpose to be accomplished near a certain point, in a certain way. The covenant which follows this recital, and upon which plaintiff's rights are based, provides that "*if by the diversion of said water of Mill Creek, as aforementioned, by them, or their successors, or assigns,*" the water now belonging to plaintiff, or to be developed, "*is diminished,*" etc., etc. This covenant embraces the purpose and object the parties had in view when they contracted, and does not apply to any particular place or method. The general purpose they had in view was to divert all the waters of the stream, and it was this general diversion which they recognized might injure the plaintiff's acquired rights in developed water, and against which he was to be protected by the contract. And this is further apparent from the covenant on plaintiff's part not to "hinder, impede, or delay the changing of the course of the water." The gist of the covenant was the diversion of the water of Mill Creek by the defendants, not to be interfered with by the plaintiff. Under the terms of that contract, as it was a matter of more particular interest to them, the defendants accorded themselves wide discretion in determining where, or how, the diversion should be made, a discretion which the plaintiff covenanted not to interfere with, and which covenant he faithfully kept, and for which non-interference the defendants covenanted that he would

be protected against any damage, which the exercise of that discretion on their part should result in to him.

As to the amount of damages. This only applies to the one thousand dollars which the court found the plaintiff had suffered as special damages for injuries to trees, and the fruit crop thereon, by reason of the defendants' failure to furnish the water as agreed. It is insisted by appellant that such damages are remote and speculative. The court found that, when the contract between the parties was made, the defendants knew that the ten inches of water contracted for had a peculiar value to plaintiff, inasmuch as his land and orchard were of little value without it. The orchard was in bearing when the breach of the covenant was committed, and there was no other source from which plaintiff could obtain water for irrigation. There is no question but what the amount of damages awarded was suffered, and we think that under the facts as found the court was warranted in making the award. (*Mabb v. Stewart*, 133 Cal. 559.)

The judgment and order appealed from are affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[L. A. No. 1063. Department One.—October 29, 1903.]

STIMSON MILL COMPANY, Respondent, v. LOS ANGELES TRACTION COMPANY, Appellant.

MECHANIC'S LIEN—CONSTRUCTION OF BRIDGE—USE OF MATERIALS IN TEMPORARY STRUCTURE—PROPERTY OF CONTRACTORS—PROVISION IN CONTRACT.—Materialmen cannot enforce a lien upon a completed bridge for materials which were not furnished to be used, and were not actually used, in the bridge as contracted for and completed, but were furnished and used only in the erection of a temporary structure which formed no part of the completed bridge, but which the contractors were permitted by the contract to provide for temporary support of track, rails, and cars, to prevent damages for delay under the terms of the contract until permanent steel support should be furnished as contracted for, which temporary structure remained the property of the contractors, and was properly removed by them when the bridge was completed.

ID.—USE OF TEMPORARY STRUCTURE—ACCEPTANCE—VOID CONTRACT—EVIDENCE OF CONSTRUCTION.—The use by the defendant of the temporary structure for the running of trains did not, under the circumstances of the case, furnish any evidence of the acceptance of the bridge as completed; nor was its occupation by it under a void contract conclusive evidence of construction.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. W. F. Fitzgerald, Judge.

The facts are stated in the opinion.

E. E. Millikin, for Appellant.

Percy R. Wilson, for Respondent.

SMITH, C.—This suit was brought to foreclose a lien for materials furnished by plaintiff in the construction of defendant's bridge over the Los Angeles River in the city of Los Angeles. The plaintiff had judgment, from which and from an order denying its motion for a new trial the defendant appeals. The bridge was constructed under an unrecorded contract with Sawyer and Arthur, partners, by the terms of which it was to consist of five steel spans and the balance of

wood and steel, or of wood. By the terms of the contract it was to be completed November 9, 1898; and it was stipulated that for delay in completion the contractors should pay, while the bridge remained uncompleted, fifty dollars per day for ten days, and thereafter one hundred dollars. But it was provided "That from and after the day that said contractors allow said party of the first part to run cars over said bridge, . . . whether over the completed structure or a temporary structure which said contractors may provide, . . . no damages shall be awarded hereunder; but that for the purposes of ascertaining said liquidated damages said structure shall be considered as completed."

The bridge was completed, with the exception of the five steel spans, some time prior to the 15th of November; when it was ascertained that the steel for the uncompleted part could not be obtained in time to complete the bridge within the time stipulated. Thereupon, at the suggestion of the manager of defendant, the contractors undertook to put up, before the 30th of November or 1st of December, a temporary structure of timber over which the cars could be run on that date; and this was accordingly done. This structure rested upon planks laid on the ground, and was not in any way physically connected with the bridge, except that on it was laid the permanent track consisting of stringers, ties, and rails. The structure was soon afterwards replaced by the steel structure originally contemplated—the work of substitution commencing immediately upon the completion of the temporary structure, and its effect being to leave the track supported by the new steel structure in place of the wooden structure removed. It is admitted that the plaintiff furnished the contractors lumber of the aggregate value of something over five thousand dollars, and it is found by the court that this was used in the construction of the bridge. But it appears from the evidence that a part of the lumber went into the temporary structure and was afterwards carried away by the contractors; and it is claimed by the defendant that the plaintiff's claim should be reduced by this amount. The court below held the contrary, refusing to allow the defendant to show the amount and value of the lumber used in the temporary structure, and whether in this the

court erred is the only question in the case that will require consideration.

The contention of the appellant on this point must, we think, be sustained. It is settled by many decisions in this state that to entitle a materialman to a lien under section 1183 of the Code of Civil Procedure the materials must be furnished to be used, and must actually be used, in the construction of the building or other structure against which the lien is sought to be enforced (*Houghton v. Blake*, 5 Cal. 240; *Patent Brick Co. v. Moore*, 75 Cal. 211; *Silvester v. Coe Quartz Min. Co.*, 80 Cal. 513; *Bewick v. Muir*, 83 Cal. 373; *Hamilton v. Delhi Min. Co.*, 118 Cal. 153, 154; *Roebbling's Sons Co. v. Bear Valley Irr. Co.*, 99 Cal. 488); and this we understand means that the materials must be used, not merely in the process of construction, but "in the structure,"—that is to say, they must be used as the materials of which it is constructed. (*Hamilton v. Delhi Min. Co.* 118 Cal. 153; *Silvester v. Coe Quartz Min. Co.*, 80 Cal. 513; *Gordon Hardware Co. v. San Francisco, etc. R. R. Co.*, 86 Cal. 620.)

The case, we think, comes clearly within the application of this principle. The temporary structure was put in merely for the purpose of supporting the track until the steel necessary for its permanent support could be obtained. This was done by the contractors on their own account, under the provision of the contract authorizing them, as a means of avoiding liability for the heavy damages stipulated for delay in completion of the work, to do so. The temporary structure was therefore not a part of the bridge, either as contracted for or as actually completed; but it remained the property of the contractors, who were entitled to remove it. Hence neither the contractors, nor the plaintiff as furnisher of the materials for it became entitled to a lien.

Nor, as is claimed by the respondent's counsel, did the use of the temporary structure by the defendant, under the circumstances of this case furnish any evidence of its acceptance of the bridge as completed. Nor, is it true, that the "occupation of a structure under a void contract is conclusive upon the question of construction." It is not so held in *Joost v. Sullivan*, 111 Cal. 286 (cited by counsel), or in the case therein cited (*Giant Power Co. v. San Diego Flume Co.*,

78 Cal. 196). Nor is the law now the same as when those cases were decided. (Code Civ. Proc., sec. 1187.)

We advise that the judgment and order appealed from be reversed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

Shaw, J., Angellotti, J., Van Dyke, J.

[Sac. No. 998. Department One.—October 31, 1903.]

In the Matter of the Estate of GEORGE M. KASSON, Deceased. GEORGE W. LINDY, Respondent, v. MARTHA E. McCHESNEY et al., Respondents, and MARY E. MANN, Appellant.

PROCEEDING TO DETERMINE HEIRSHIP—SECOND TRIAL—CONTINUANCE—DISCRETION.—Upon the second trial of a proceeding to determine heirship, where the cause was long pending, and a previous continuance had been granted to the appellant for several months, and he had had ample opportunity to prepare for trial, and the cause was set for trial, without objection, by a jury demanded by the appellant, a motion for continuance by him thereafter was addressed to the discretion of the court, and it was not an abuse of discretion to refuse it and to proceed to a trial of the proceeding.

1A.—DISQUALIFICATION OF JUDGE—BIAS AND PREJUDICE—CONFLICTING AFFIDAVITS—MOTION PROPERLY DENIED.—Where the disqualification of the judge to try the proceeding was objected to by the appellant for alleged bias and prejudice, but upon the showing made by the affidavits and counter-affidavits it did not appear that the judge could not fairly and impartially try the cause, the motion to disqualify him for bias and prejudice was properly denied.

1D.—NATURE OF PROCEEDING—EACH PARTY AN ACTOR AS AGAINST ADVERSE PARTIES—FAILURE TO APPEAR AT TRIAL—NONSUIT.—In a proceeding to determine heirship each party is an independent actor and is a plaintiff, as against all other parties whose claims are adverse, though styled a defendant; and where the appellant who claimed the entire estate as against the other parties to the proceeding failed to appear at trial, after refusal of her motion for

continuance, and offered no evidence in support of her claim, a nonsuit was promptly granted against her, and her claim was properly eliminated from the trial.

ID.—ERROR NOT EXPECTED TO.—If there were any error in granting the nonsuit, it would be error occurring at the trial, which could not be considered upon appeal where no exception was taken thereto at the time.

ID.—MOTION FOR NEW TRIAL—DISQUALIFICATION OF JUDGE AS ATTORNEY—AFFIDAVITS FILED TOO LATE—COUNTER-SHOWING.—Where the disqualification of the judge to hear the appellant's motion for a new trial was objected to, on the additional ground that he had acted as an attorney for a special administrator in the matter of the estate, but the affidavits in support thereof were filed too late to be considered, and it appeared by counter-affidavits that the judge was not disqualified as alleged, the motion to disqualify him was properly refused.

APPEAL from an order of the Superior Court of San Joaquin County denying a new trial. Edward I. Jones, Judge.

The facts are stated in the opinion of the court.

Woods & Levinsky, and James H. Budd, for Appellant.

John A. Percy, and Budd & Thompson, for Martha E. McChesney et al., Respondents.

VAN DYKE, J.—The action in which this appeal is taken is a proceeding to determine heirship under the provisions of section 1664 of the Code of Civil Procedure, in the estate of George M. Kasson, deceased. Said Kasson died September 23, 1895, leaving a will, which was duly admitted to probate November 1, 1895, in the superior court of San Joaquin County.

The proceeding to determine heirship was instituted January 15, 1897, by George W. Lindy, who is styled plaintiff. In his petition, or complaint, it was set forth and claimed that he was the only child and heir at law of said George M. Kasson; that having been omitted from the will he was entitled to the whole of said estate. The respondents here are legatees and devisees under the will of said Kasson, and appeared in due time, denying the claim of said Lindy, and set forth their claim to the whole of said estate under said

will. Appellant here was the last to appear and file her claim in said proceedings. She denied the claims of all the other parties, and alleged that she was, and is, the only child and sole heir at law of said deceased, and that being also omitted from the will, she is entitled to the whole of said estate.

Said action or proceeding thereafter came on for trial, and on April 28, 1898, judgment was entered decreeing that neither Lindy nor the appellant were entitled to any part of said estate, and that the respondents were entitled to the whole thereof by virtue of the terms of the will. On appeal by the appellant herein from this judgment a new trial was granted by this court in January, 1900, mainly on the ground of error committed by the trial court in refusing to allow the appellant the right of cross-examination of certain of the witnesses on the part of the respondents. (*Estate of Kasson*, 127 Cal. 496.)

The matter was thereafter regularly set down to be again tried on May 28, 1900, and upon motion of counsel for appellant the date of the trial was afterwards postponed; and on the calling of the regular trial calendar of the court below, in October, 1900, the cause was set down to be tried before a jury on the 13th of December, 1900. On December 3, 1900, counsel for appellant moved the court for a postponement of the trial, which motion was denied on December 5, 1900. On December 10th—being three days before the cause and been set down for trial by a jury—counsel for appellant appeared and alleged the disqualification of the judge, before whom the cause was then pending, to try the same, upon the ground of prejudice and bias. The other judge of the superior court of said county, at that time Honorable Joseph H. Budd, was disqualified, being the father of one of the attorneys in said cause. On December 13, 1900, the cause was regularly called for trial, and a jury was in attendance, and respondents, being in attendance and ready for trial, demanded that the trial should proceed. The appellant was not present, nor were her counsel, but R. E. Beardslee, Esq., representing appellant's counsel, appeared and presented a motion for a continuance of the trial, which motion was denied, and thereupon Mr. Beardslee stated that he had nothing further to do with the case, and left the courtroom. The jury was dismissed, pursuant to a rule of the court, because no

one was present to deposit the jury fee. The appellant not appearing, the court below caused her default to be entered for failure to prosecute or defend her rights at the trial, and thereupon the court also entered a nonsuit against her, and proceeded to hear the evidence of the respondents in support of their claim, and thereafter entered judgment in their favor and against the appellant. The appellant thereafter moved for a new trial, which motion was denied, and this appeal is taken from the order denying said motion. Appellant also attempted to appeal from the judgment and from the order granting a nonsuit against her, and from the order entering her default as aforesaid. This court, in December, 1901, on motion of the respondents, dismissed the appeals taken in said cause from the orders granting a nonsuit against her, and also granting a default, and from the judgment given and entered therein in favor of the other defendants and against her, but denied the motion to dismiss the appeal from the order denying a new trial. (*Estate of Kasson*, 135 Cal. 1.)

The only appeal, therefore, now before the court to be considered is that from the order denying appellant's motion for a new trial.

One of the main contentions of appellant on this appeal is, that the refusal of the trial court to grant her motion for a continuance or postponement of the trial was such an abuse of discretion as to amount to error. In the bill of exceptions prepared by appellant on motion for a new trial it is recited: "That on October 1, 1900, at the calling of the calendar for the purpose of setting cases for trial, the above-entitled action and proceeding was, without objection by any one, set for trial before Edward I. Jones, one of the judges of said court, on December 13, 1900, attorneys in said cause being present, including L. Levinsky, of Woods & Levinsky, attorneys for defendant and claimant Mary E. Mann, who then and there demanded a trial with a jury. At a former trial of said action and proceeding by a judgment duly had, given, and entered, it was adjudged that George W. Lindy, plaintiff therein, is not the son or heir of said George M. Kasson, deceased, and is not entitled to any part of the estate of said deceased, and such judgment as against said Lindy had become final long before the said time of

calling such calendar on October 1, 1900, as aforesaid; and presumably, therefore, because of the finality of such judgment the said Lindy did not appear in person, by attorney, or otherwise, at the said calling of said calendar, or at any time after such judgment became, as aforesaid, final." The principal ground on which the motion for continuance was based, according to the affidavit of said appellant's attorney, Levinsky, was, that his partner, S. D. Woods, had departed from the state of California for the purpose of attending to his duties as Congressman in the second district of California, and would be absent for several months. But in another affidavit filed in said cause by said attorney, he says: "That affiant has had full charge and control of all litigation on behalf of said defendant and claimant, Mary E. Mann, in the above-entitled action, matter, and proceeding, at all times since the firm of Woods & Levinsky became associated and connected therewith." In view of the fact that this was the second trial, and that the case had been long pending, giving the appellant ample opportunity to be ready for the trial, and the statement in the bill of exceptions that the setting of the trial was without opposition by her attorney, but by consent, and that a jury had been summoned at her request, we think it was not an abuse of discretion on the part of the judge to deny the motion and proceed to the trial of the cause.

Another of the contentions on the part of appellant is, that the trial judge was disqualified by reason of prejudice and bias, and upon the application of appellant should have called in another judge to try the case. In the affidavit in support of this demand, the attorney in charge of the case on behalf of the appellant says: "The said Edward I. Jones took said motion for continuance under advisement until Wednesday, the fifth day of December, 1900, at which time he stated: 'I, this morning, have read this affidavit and I feel that it will be error to grant a continuance thereon.' And affiant cannot understand why said judge should appear anxious to try this case on the 13th of December, 1900, when no harm can befall the defendants, or either of them, by a continuance thereof until some time in January, 1901; and that on the former trial said judge, Edward I. Jones, remarked from the bench: 'It may seem strange, but, neverthe-

less, it is a fact that until this morning I have not had any opinion in this case, but now that the case is submitted to me I will decide it. There is no question in my mind that neither George W. Lindy, the plaintiff, nor the claimant, Mary E. Mann, have any right in this case. I shall find that George W. Lindy is not and never was a son of George M. Kasson, and shall find that the claimant, Mary E. Mann, never was the daughter of George M. Kasson. And permit me to say further that I am strongly opposed to cases of this kind. I am opposed to cases where a man who has lived in a community for many years dies and then some one appears and claims to be a child. This state has had too much of this kind of business, and it is time it was stopped. It is very easy to get counsel to represent parties who claim to be interested in an estate, and this court is opposed to it.''' But he also says: "That affiant and the claimant, Mary E. Mann, desires it expressly understood that in and by this affidavit no charge is made or attempted to be made against the integrity of the aforesaid Honorable Edward I. Jones, and this affidavit is made for the purpose of showing that by the conduct and statements made by the said Honorable Edward I. Jones, that he is biased and prejudiced in this case, and by reason thereof has become and is disqualified to sit in the hearing of or at the trial of this action, matter, and proceeding."

John E. Budd, attorney for respondents, was sworn, and testified in reply to said affidavit, and among other things said: "That at no time prior to December 10th, 1900, which is three days before the date set for the trial of this action, did counsel for claimant, Mary E. Mann, make or file any objection to the Honorable Edward I. Jones sitting as judge on the trial of this case, or in any of the proceedings taken therein on any ground whatever." The affidavit of Budd also denies that on the former trial Judge Jones made any of the statements above set forth. In this connection it may be proper to state that on December 13, 1900, substantially the same showing was made before this court by said attorney Levinsky, on behalf of the appellant herein, in an application for a writ of prohibition restraining the said Honorable Edward I. Jones, judge of said superior court of San Joaquin County, from proceeding to the trial of the above-entitled

action on the ground that said judge was disqualified, which said application was by this court denied. From the showing made by the affidavits and counter-affidavits it does not appear that the Honorable Edward I. Jones could not fairly and impartially try the cause on account of bias or prejudice, and the motion to disqualify him was therefore properly denied.

On the day fixed as aforesaid for the trial of the action, December 13, 1900, defendants and respondents, with their attorneys, appeared, but the attorneys of said Mary E. Mann failed to appear, and Robert L. Beardslee, an attorney at law, appeared in their behalf, and a jury being regularly drawn to try the cause was present in court. Thereupon Mr. Beardslee said: "At this time, on behalf of Mary E. Mann, one of the defendants and claimants, and representing Woods & Levinsky, I move the court that the trial of this case be postponed to the regular term in January," and submitted affidavits in support of his motion, which was opposed by the defendants and respondents. The affidavit, in support of the motion for continuance, was based upon the ground substantially as in the motion for continuance made on the 3d of December, which motion the court denied. What was said in reference to the motion of December 3d, is applicable here, and it was not an abuse of discretion in denying the motion. Dilatory motions are not favored in law. A motion for continuance is addressed to the discretion of the court, and, as said in *Barnes v. Barnes*, 95 Cal. 177, the action of the court thereon "will not be revised except for the most cogent reasons. The court below is apprised of all the circumstances in the case, and the previous proceedings, and is therefore better able to decide upon the propriety of granting the application than the appellate court, and when it exercises a reasonable and not an arbitrary discretion its action will not be disturbed." After the court denied this last motion for a continuance, Mr. Beardslee, who had appeared for the regular attorneys of Mary E. Mann, stated that he had nothing further to do with the case, and thereupon, no one being present representing the said appellant, the court granted a nonsuit as to her, and this appellant claims to be error, because she was not the plaintiff in the action. It is true that the appellant was, in the title of the pleadings, styled a "de-

fendant," but this fact does not fix her *status* in the proceeding. In a case like this, every party is an independent actor, and is a plaintiff as against all other parties whose claims are adverse. (*Estate of Kasson*, 127 Cal. 505.) Section 1664 of the Code of Civil Procedure, under which the proceeding was had, provides that when the pleadings of all the parties are in, the subsequent proceedings shall be the same as in an ordinary civil action, and that the provisions of said code regulating the mode of procedure for the trial of civil actions are applicable to this proceeding. The section in question also provides that the court shall enter a default against all parties failing to "prosecute or defend their rights," as well as those who fail to appear or plead. Under the order of trial established by the court in this case, the appellant should have introduced her testimony first, she being, as against the parties claiming under the will, the plaintiff in the case, and it was the duty of the court to determine the heirship of said deceased, the ownership of the estate, and the interest of each of the respective claimants thereto or therein. (*Blythe v. Ayres*, 102 Cal. 259.) Appellant failing to introduce any proof in support of her claim, it is proper to enter a nonsuit as against her, and eliminate that claim from the trial. Thereupon the other claimants proceeded to prove that they were entitled to distribution of the estate. If this were error at all (which we do not admit), it would be one occurring at the trial, and it was not excepted to at the time. No exception was entered against the nonsuit or default until the bill of exceptions was prepared.

On the hearing of the motion for a new trial, on April 6, 1901, the appellant, through her attorneys, moved to disqualify the judge from hearing said motion. In the affidavit in support of this last motion, the only additional ground why the said judge should not act in the case was, that he had been the attorney for Clark McChesney, as special administrator of the estate of said Kasson. McChesney filed an affidavit that he never was so employed nor had acted as his attorney in any action or proceeding. And the judge, asking permission so to do, stated that he was never employed nor acted as attorney in the case, nor had any interest in it as attorney for McChesney, nor had been consulted by him in any manner. The judge was therefore not disqualified under the

statute, not having been attorney or counsel for the party in the action or proceeding. (Code Civ. Proc., sec. 170.) But, as respondent suggests, the affidavits under consideration were not served within the time prescribed by the code, and should not be considered. The notice of intention to move for a new trial was filed December 24, 1900. The affidavits therefore were not filed within the time prescribed by the code,—to wit, within ten days after said notice. (Code Civ. Proc., sec. 659, subd. 1.)

The order appealed from is affirmed.

Shaw, J., and Angellotti, J., concurred.

[L. A. No. 1159. Department Two.—November 4, 1903.]

THE PEOPLE, Respondent, v. HENRY C. GAY et al., Defendants; MARY E. CANTY, Assignee, Appellant.

JUDGMENT FORECLOSING CERTIFICATE OF PURCHASE—MOTION OF ASSIGNEE TO VACATE—APPEAL—AFFIDAVIT NOT PART OF RECORD—PRESUMPTION.—Upon appeal from an order denying the motion of an assignee of a certificate of purchase of school land to vacate a judgment foreclosing the certificate of purchase, for a defective affidavit for publication of summons, where the only proof that she was such assignee is an affidavit not embodied in any bill of exceptions, but merely certified by the clerk, the affidavit is no part of the record, and cannot be considered for any purpose. There being nothing in this court to show that appellant was a party aggrieved, or had any interest in the controversy, or any right to make the motion, it must be presumed the motion was properly denied.

APPEAL from an order of the Superior Court of Santa Barbara County denying a motion to vacate a judgment. W. B. Cope, Judge.

The facts are stated in the opinion.

F. D. Brandon, and C. F. Carrier, for Appellant.

Tirey L. Ford, Attorney-General, and E. W. Squier, District Attorney, for Respondent.

GRAY, C.—This is an action brought by the state against the holder of a certificate of purchase of certain school land in Santa Barbara County to foreclose his right and title therein for non-payment of interest thereon.

The summons was published and judgment thereafter entered for plaintiff July 9, 1896. In 1901 Mary E. Canty seems to have moved the court to set aside the judgment because of a defective affidavit for publication of the summons. The court denied the motion, and Mary E. Canty appeals. The appellant was not a party to the suit or judgment of which she complains. There is, however, printed in the transcript an affidavit showing that she is by deed the successor in interest to the rights of the defendant Gay in and to the land in question. This affidavit is not included in any bill of exceptions, nor is it certified in any way except by a certificate of the clerk of the trial court. It cannot therefore be considered upon this appeal for any purpose. (Rule XXIX of supreme court; *Melde v. Reynolds*, 120 Cal. 234.) This leaves nothing before us to show that appellant was a party aggrieved, or had any interest in the controversy, or any right to make the motion. We must therefore presume that the trial court properly denied the motion.

We advise that the order appealed from be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

[Sac. No. 922. Department Two.—November 4, 1903.]

DAVID PATERSON et al., Appellants, v. B. A. OGDEN et al., Respondents.

PUBLIC LANDS—AGRICULTURAL PATENT—CHARACTER OF LAND—ADJUDICATION—COLLATERAL ATTACK BY MINING CLAIMANT—ACTION TO QUIET TITLE.—A United States patent for agricultural land is an adjudication by a tribunal having jurisdiction that the lands were agricultural and not mineral in character, and a mining claimant who did not appear and protest or make any adverse claim against the issuance of the patent cannot collaterally attack the patent in an action to quiet his title to the mining claim against the patentee.

ID.—RESERVATION IN PATENT—CONSTRUCTION—RIGHT TO MINE.—A clause in an agricultural patent making it "subject to the right of a proprietor of a vein or lode to abstract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law," if not void, is to be properly construed as only permitting the proprietor of a vein whose apex lies outside of the land, but which penetrates the land on its dip or downward course, to abstract and remove his ore therefrom. It does not confer a right to enter and mine upon the surface of the patented land.

APPEAL from a judgment of the Superior Court of Tuolumne County and from an order denying a new trial. B. C. Rust, Judge.

The facts are stated in the opinion of the court.

F. W. Street, for Appellants.

The appellants by their location, annual work, and expenditures had acquired a grant from the United States of the lands embraced within the Gem Mine, and the ground was not afterwards open to sale and patent, or subject to the disposal of the government. (*Wirth v. Branson*, 98 U. S. 121; *Belk v. Meagher*, 104 U. S. 279; *Gwillim v. Donnellan*, 115 U. S. 45; *Noyes v. Mantle*, 127 U. S. 348; *Sullivan v. Iron Silver M. Co.*, 143 U. S. 431; *Mery v. Brodt*, 121 Cal. 332-335; *Lindley on Mines*, sec. 539.) Lands in which there are known mines are not subject to pre-emption or homestead entry. (U. S. Rev. Stats., secs. 2258, 2289; *Deffebach v. Hawke*, 115

U. S. 404; *Burfenning v. Chicago Ry. Co.*, 163 U. S. 321-323.) The government having no title to the land included within the Gem Mine at the time of the issuance of the agricultural patent, including that mine, the patent was void to that extent, and may be collaterally attacked. (*Durfee v. Plaisted*, 38 Cal. 80; *Thompson v. True*, 48 Cal. 601; *Edwards v. Rolley*, 96 Cal. 408;¹ *Klauber v. Higgins*, 117 Cal. 451-464; *Cucamonga Fruit and Land Co. v. Moir*, 83 Cal. 101; *Dolan v. Carr*, 125 U. S. 618, 624; *Gerrard v. Silver Peak Min. Co.*, 82 Fed. 578-583.)

J. P. O'Brien, for Respondents.

All parties were bound to take notice of the application for the agricultural patent, of which public notice was given, and to file any adverse claims thereto. (*Wight v. Dubois*, 21 Fed. 695; *Richards v. Wolfing*, 98 Cal. 195.) The patent was a conclusive adjudication as to the character of the land patented, which is not open to contestation in any collateral proceeding. (*Doll v. Meader*, 16 Cal. 297; *Gale v. Best*, 78 Cal. 235;² *Irvine v. Tarbat*, 105 Cal. 237; *Dreyfus v. Badger*, 108 Cal. 58; 1 Lindley on Mines, sec. 208, p. 253; *Saunders v. La Purissima Gold Min. Co.*, 125 Cal. 159.) Merely by virtue of plaintiff's location and option to purchase not exercised, the government did not part with its title. (*Forbes v. Gracey*, 94 U. S. 762; *Black v. Elkhorn Min. Co.*, 163 U. S. 449.)

McFARLAND, J.—This is an action to quiet title to an alleged quartz-mining claim called the Gem Mine. Judgment was for defendants, and plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

The contest is only about that part of the alleged Gem Mine which lies in the west half of the southwest quarter of section 3, township 2 north, range 14 east, M. D. M. On November 2, 1881, respondents' predecessor in interest, John McNamee, made homestead entry as agricultural land at the United States land office at Stockton, California, of land which includes the west half of the southwest quarter above mentioned. On February 5, 1889, he commuted the said homestead entry to cash entry No. 9753, and paid the United States government therefor; and on November 24, 1890, the

¹ 81 Am. St. Rep. 234.

² 12 Am. St. Rep. 44.

government issued to him a patent for said land. After the said homestead entry, and after the land had been returned by the United States surveyor-general as agricultural land. J. N. Paterson, appellants' predecessor in interest, located what is called the Gem Mine. At the time when McNamee made his final proofs no protest or adverse claim was made by Paterson, or any other person.

It is well settled that issuance of a United States patent for land as agricultural in character is a judgment by a tribunal having jurisdiction that such is the character of the land, which cannot afterwards be collaterally attacked. (*Gale v. Best*, 78 Cal. 235,¹ and *Saunders v. La Purissima Gold Mining Co.*, 125 Cal. 159, and the authorities cited in those two cases; also *Richards v. Wolfing*, 98 Cal. 195, and *Wright v. Dubois*, 21 Fed. 695.) The patent, therefore, conveyed the land to McNamee, and was an adverse adjudication of any asserted right of appellants' grantor to the land as a mining claim. In the case at bar the patent to McNamee contained the following clause: "Subject to the right of a proprietor of a vein or lode to abstract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted as provided by law." We have not been referred to any law authorizing the insertion of this clause; and it was held in *Cowell v. Lamiers* (10 Saw. 246), 21 Fed. 200, that a reservation of mineral land in an agricultural patent is void. But waiving that question, the court below in the case at bar correctly construed the clause as only subjecting the patented land "to the right of the proprietor of a vein or lode, the top or apex of which lies outside of the west half of the southwest quarter of section 3 aforesaid, but which penetrates into the land on its dip or downward course, to abstract and remove his ore therefrom as provided by law." It does not give any right to enter and mine upon the surface within the patented lands. These views make it unnecessary to consider the express finding that at the time of the patent no part of the lands was "known valuable mineral land, but on the contrary all of the lands embraced within the west half of the southwest quarter of said section 3 were at that time, and now are, agricultural lands."

¹ 12 Am. St. Rep. 44.

In answer to the claim by appellants of title under the statute of limitations by adverse possession since the date of the patent, the court finds expressly that there was no such adverse possession; and the evidence is clearly sufficient to support that finding, irrespective of the further finding that appellants had not paid any of the taxes levied on any part of said land. The above views dispose of the controlling questions in the case adversely to appellants' contention; and there are no other points necessary to be noticed.

The judgment and order appealed from are affirmed.

Lorigan J., and Henshaw, J., concurred.

[Sac. No. 1081. Department One.—November 5, 1903.]

D. C. POOL et al., Respondents, v. WILLIAM BUTLER, and GEORGE SIMMONS, Administrators, etc., Appellants.

ACTION TO CONDEMN LAND—PLAINTIFF NOT BOUND TO TAKE.—A plaintiff, by bringing an action to condemn land for a public use, does not bind himself to take the land and pay the compensation fixed by the court or jury.

ID.—UNACCEPTED DEPOSIT—TENDER—APPEAL FROM DECREE—ABANDONMENT OF ENTERPRISE—WITHDRAWAL OF DEPOSIT.—Where a deposit of the compensation fixed was made with the clerk but was not accepted, it amounted to no more than a tender; and where the defendants by motion for a new trial and appeal sought to reverse the entire decree, and thereby effected a long delay, the plaintiffs had the right, before the defendants were willing to accept the deposit, or were in a position to demand it, after affirmance of the judgment upon appeal, to abandon the enterprise and withdraw the deposit except as to costs.

ID.—NOTICE PENDING APPEAL—DISMISSAL OF ACTION—ORDER AFTER AFFIRMANCE.—Where the defendants were notified before the judgment became final by affirmance upon appeal, that the plaintiffs would not take the property, and would move immediately upon the filing of the remittitur to vacate the judgment and dismiss the action, an order dismissing the action pursuant to such notice and motion will be affirmed upon appeal therefrom.

APPEAL from an order of the Superior Court of Yolo County dismissing an action. E. E. Gaddis, Judge.

The facts are stated on the opinion.

R. Clark, and G. Clark, for Appellants.

On payment, or tender of payment, the right to discontinue ceases. (*Merrick v. Mayor etc. of Baltimore*, 43 Md. 231; *Chicago v. Barbain*, 80 Ill. 485; *Los Angeles Ry. Co. v. Rumpp*, 104 Cal. 20, 25; 6 Am. & Eng. Ency. of Law, 634; Randolph on Eminent Domain, 181; *Denver etc. Ry. Co. v. Lamborn*, 8 Colo. 380.) He who pays money into court loses all control over it. (25 Am. & Eng. Ency. of Law, 943.) The money is paid into court for the owner. (Const., art. I, sec. 11; Code Civ. Proc., secs. 1251, 1252, 1253; *Callahan v. Dunn*, 78 Cal. 370; *Glenn County v. Johnson*, 129 Cal. 408.)

Hudson Grant, for Respondents.

The action for condemnation may be withdrawn where the land has not been taken nor paid for. (*Lamb v. Schottler*, 54 Cal. 319; Lewis on Eminent Domain, secs. 541, 656; *O'Neill v. Freeholders of Hudson*, 41 N. J. L. 161; *Chicago v. Barbain*, 80 Ill. 402; *Chicago v. Shepard*, 8 Ill. App. 602; *Denver etc. Ry. Co. v. Lamborn*, 8 Colo. 380; *Land and Canal Co. v. Hartman*, 17 Colo. 141.)

HAYNES, C.—This appeal is from an order dismissing the action, made upon plaintiffs' motion. The action was to condemn a strip of land 60 x 145 feet, for a ferry-landing on the Sacramento River, in Yolo County. There was a prior appeal from the judgment condemning the land for said purpose in which the judgment was affirmed (reported in 134 Cal. 621, entitled *Pool v. Simmons*). In that case the trial court gave judgment to the plaintiff, condemning the land to the burden of an easement for the proposed ferry-landing, and assessing the damages at \$285. The defendants upon the trial reserved several exceptions, and moved the court for a new trial upon all the issues, and the motion was denied. Thereupon said former appeal was taken from the judgment and from the order denying a new trial. Both the motion for

a new trial and the appeal presented several questions relating to the regularity and validity of the proceedings and judgment, as well as the amount of damages awarded. The plaintiff deposited with the clerk the said sum of \$285 and costs, within thirty days after the entry of the judgment. The defendants did not accept the money so deposited, but took and perfected their appeal, and did not abandon all defenses except for greater compensation, and could not demand or obtain the money until the appeal should be determined. Section 1254 of the Code of Civil Procedure provides, among other things, as follows:—

“The defendant who is entitled to the said money paid into court as aforesaid, or upon any judgment in such proceedings, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court.”

No such order was asked for by defendants. They could not get it without abandoning all the defenses they had to the action, except as to the sufficiency of the damages awarded; and such other defenses were not abandoned, but were pressed upon the motion for new trial, and in this court upon the appeal. If they had applied to the court for an order directing the clerk to pay over the money, it could not have been granted pending the motion for a new trial, or at any time after the appeal was taken until the judgment was affirmed or the appeal dismissed. The court had no power to make the requisite order for the payment of the money, the judgment having been suspended by the appeal, which was a refusal to accept the money, or to treat the judgment as a final determination of the rights of the parties, though it was in form final. Judgment in the court below was entered June 21, 1898, and the appeal was decided December 3, 1901, and became final January 2, 1902, a period of three and a half years after judgment in the court below. Such delay may have furnished in this case, and might in many others, sufficient reasons for an abandonment of the enterprise. During all that time defendants were protesting against the judgment, and when plaintiffs finally relieved them from what they insisted was a wrong, oppressive, and erroneous judgment by dismissing the proceeding, now appeal from the order

relieving them from it. The ultimate question, however, is whether the court erred in dismissing the action.

The proceeding in eminent domain is an exercise of the sovereign power of the state, though the state does not appear upon the face of the record as a party. The owner of the land sought to be appropriated to a public use may voluntarily agree with the agent of the state as to price, and convey it to the person or corporation who may desire it for a public use, but in the proceeding under the statute there is no element of contract. It is an adversary proceeding wherein the state appropriates the use of the land to the public, subject only to the requirement of the constitution that the land shall not be taken or damaged for public use without just compensation having been first made or paid into court for the owner. (Const., art. I, sec. 14.) But a plaintiff seeking to condemn land for a public use does not, by bringing the action to condemn, bind himself to take the land and pay the compensation fixed by the court or jury, since it may be so great as to make the proposed use impossible, or the delay in obtaining the right to use the land for the purpose intended may permit another to acquire a competitive use of other lands for the same purpose, and thus make his use undesirable, even if the compensation were reasonable. Hence a plaintiff in such action is conceded to have a right to abandon the proceeding and decline to take the land, the question then being, at what stage of the condemnation proceedings may he abandon the enterprise or decline to take the property? Pending the motion for a new trial, and later, pending the appeal, it is clear that plaintiffs were not bound to pay or deposit the damages assessed upon the trial; and it is equally clear by the motion and the appeal that the defendants refused to accept payment, at least until they had exhausted all their resources to defeat the condemnation, and during all that time the plaintiffs had the right to abandon the enterprise and refuse to pay the compensation assessed by the court. It is contended, however, that having deposited the money with the clerk of the court, they could not withdraw it, and that upon the affirmance of the appeal the defendants were entitled to receive it. I think plaintiffs had the right to abandon at any time before the defendants were willing to receive it, or were in a position to demand it. Before the

former appeal was decided plaintiffs informed defendants of their intention to abandon the establishment of the ferry, and that, if the judgment should be affirmed, they would move to dismiss the proceeding, and they withdrew the money deposited, except sufficient thereof to pay costs.

It is contended on behalf of appellants that the right of the defendants to the land, or the easement therein, vested in the plaintiffs by the deposit with the clerk, and that there can be no abandonment by the plaintiffs thereafter. But the deposit, I think, under the circumstances, was only a tender, and in such cases the money tendered does not vest in the person to whom it is tendered unless it is accepted. In this case the deposit was not accepted. The defendants persisted in their contention that the judgment was erroneous and invalid, and sought to have it reversed, and could hardly contend that the money or the right to it was vested in them so long as they contended that the plaintiffs had no right to the land. The vesting of the title to the deposit in the defendants is coincident with the vesting of the right to the land for the purposes for which it was sought, but pending the appeal the plaintiffs could assert no right to the land or its use under the judgment which had been stayed and suspended by the appeal, during which time the court was powerless to enforce it; nor could the defendant say, "The right to the money is vested in us, but you shall not have the land." The title to the land does not vest in the plaintiffs until "the final order of condemnation" is made by the court, and a copy of the order filed in the office of the county recorder, "and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified." (Code Civ. Proc., sec. 1253.) Counsel for appellants cites *Los Angeles Ry. Co. v. Rumm*, 104 Cal. 20, to the proposition that the appeal to the supreme court gave no right to withdraw the money. But that case and this are materially different. There the plaintiff paid the money into court, and it was paid over to the defendant, who filed her abandonment of all defenses except "her claim for greater compensation," and as to that claim she appealed, and the plaintiff took possession of the land and constructed its road over it. The judgment, except as to the amount of damages, was accepted by the defendant and remained in force; and it was upon this state of the facts

that the court said, "Upon the payment of the money plaintiff acquired a vested right in the property, and the defendant a vested right in the compensation," and it was held "that the appeal of defendant, accompanied by her abandonment of other defenses, did not, as in ordinary cases, vacate the judgment." Here, the defendants not having abandoned all defenses except their claim for greater compensation, the entire judgment was suspended, and they did not, nor could not, demand the money deposited by the plaintiffs, nor could the court make any order for its payment to defendants until after the affirmance of the judgment by the appellate court. "In the nature of things, this provision for payment cannot apply to the claim of a defendant for unliquidated damages thereto, if the land be not finally taken. As to such claim the money is not paid into court for the defendant, but as security only." (*Steinhart v. Superior Court*, 137 Cal. 575, 576.¹) In the same case (p. 579), it was further said: "I do not agree to the proposition that compensation is made to the owner by paying into court a sum of money before the damage has been judicially determined and when the property-owner cannot take the money. . . . It is not paid into court *for him* until he can take it." In the face of the appeal as taken, they could not know that they could ever acquire the right to appropriate it, and were not bound to keep the deposit good, and the withdrawal of it was evidence of an abandonment, which was made more explicit by informing defendants, the appellants in that case, that they desired to dismiss the action and abandon the establishment of the proposed ferry, and offered to pay the defendants' costs in the trial court and one half of the costs on appeal, provided the appeal be then dismissed; which offer was refused, and the defendants were then notified that whatever the judgment of the supreme court might be plaintiffs would, upon the filing of the *remittitur*, move the court to vacate the judgment and dismiss the action, and this motion was promptly made, and the defendants (appellants here) made a counter-motion to proceed in said cause and enter an order of final condemnation, and the two motions were heard at the same time. Plaintiffs put in evidence the judgment-roll of the original judgment from which said appeal was taken showing facts herein-

¹ 92 Am. St. Rep. 183.

before stated, and gave parol evidence of other facts which have also been stated.

As to the time when, or within which, the plaintiff in condemnation proceedings may abandon them and decline to take the property, there is a conflict in the authorities; but this conflict relates to the time of abandonment and not to the right to abandon where the statute is silent upon the subject. The constitutional as well as the statutory law upon this subject assumes that the owner of the land is unwilling that it shall be taken for the proposed use, and the provisions of the statute are framed to prevent it from being taken or damaged without just compensation, and not with the view or for the purpose of enabling the owner to speculate upon the supposed necessities of the plaintiff or the public by appeals which not only involve the amount of compensation, but set at large the question whether he had a right to condemn the land at all. Lewis, in his work on Eminent Domain (sec. 656), says: "The weight of authority is, that in the absence of statutory provisions on the question, the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after confirmation or judgment the purpose of taking the property may be abandoned without incurring any liability to pay the judgment awarded."

The author cites in support of the foregoing quotation a very large number of cases from many different states; and later in the section, after citing cases from New York and Nebraska, says: "These cases from New York and Nebraska are, we believe, the only ones which are contrary to the doctrine stated at the beginning of the section."

In Dillon's Municipal Corporations (4th ed., sec. 608) the learned author says: "Under the language by which the power to open streets and to take private property for that purpose is usually conferred upon municipal corporations, they may at any time before taking possession of the property under completed proceedings, or before the final confirmation, recede from or discontinue the proceedings they have instituted. This may be done, unless it is otherwise provided

by legislative enactment, at any time before vested rights in others have attached."

This section is cited and approved in *O'Neill v. Freeholders of Hudson*, 41 N. J. L. 161, 172, in a well-considered opinion by Chief Justice Beasley. (See, also, *Graff v. Mayor etc. of Baltimore*, 10 Md. 544; *State v. C. and T. R. R. Co.*, 17 Ohio St. 103.) In *Chicago etc. Co. v. Chicago*, 143 Ill. 641, it was held: "A municipal corporation seeking to condemn real estate for public use may, after the assessment of damages and judgment of condemnation, abandon the enterprise in aid of which the condemnation is sought, and unless, within a reasonable time, the damages are paid and possession taken of the property condemned, the proceeding will be regarded as abandoned." To the same effect is *Bensley v. Mountain Lake Water Co.*, 13 Cal. 307, 317.¹ In *St. Louis etc. R. R. Co. v. Teters*, 68 Ill. 144, 150, it was said: "Where the company has not appropriated the land at the time of the trial, it would be improper to render a judgment for the recovery of the money, or to award execution, because it could not be known that the company will ever enter upon the land. It is, under the statute the payment of the money found by the jury, and not the order of the court alone, that confers the right. Although the petition has been filed, the damages assessed, and the order of the court pronounced and entered, the money must be paid before the right to enter attaches, and until they pay the damages they have the right to abandon the location of the route thus made, and adopt some other. Hence, it is improper to render a judgment of recovery or award execution, unless the jury find, or it conclusively appears from the record, that the company has entered and is in possession of the land sought to be condemned." In this case the defendants were notified before the judgment became final by its affirmance on appeal that they would not take the property, and would move to dismiss the action. Defendants cannot complain if while they were making every effort to destroy the judgment by a reversal, the plaintiffs should abandon the enterprise and withdraw a deposit the defendants refused to accept; and especially must this be true where the motion for

¹ 178 Am. Dec. 575.

a new trial and appeal, both and each, denied and contested to the end the right of plaintiffs to condemn the land for the purposes alleged. Justice requires that where possession has not been taken, and the purpose for which condemnation was sought has been abandoned, that the award of damages should not be enforced, especially where the defendants have prevented for an unreasonable time the accomplishment of the purpose. The greatest right the plaintiffs could secure in this proceeding was simply an easement for a specific purpose. Having abandoned the construction of a ferry, the plaintiffs could not convert it to another use, but the land, unencumbered by any use by the plaintiffs, would remain the property of the defendants. If the dismissal of the action has injured the defendants, it is obvious that the value of the land which has not been taken, and the injury to other lands which would have been injured if the ferry had been established are not the measure of their damages, while a reversal of the order dismissing the proceeding would have the effect of a judgment therefor. It may be that the question of dismissal is a matter within the discretion of the court, but, if so, it is clear there has been no abuse of discretion in this case.

I advise that the order dismissing said action be affirmed.

Gray, C., concurred.

For the reasons given in the foregoing opinion the order dismissing said action is affirmed.

Angellotti, J., Van Dyke, J., Shaw, J.

[Sae. No. 983. Department Two.—November 5, 1903.]

S. D. WOODS et al., Appellants, v. M. DIEPENBROCK et al., Respondents.

DISMISSAL OF ACTION—APPEAL UPON JUDGMENT-ROLL—PRESUMPTION—WANT OF PROSECUTION.—Upon appeal from a judgment dismissing an action taken upon the judgment-roll alone, without any bill of exceptions, every intendment is in favor of the judgment; and in the absence of any affirmative showing to the contrary, it will be presumed that the dismissal was ordered on some good ground, and in conformity with the rules of law. Where the record permits, a reasonable inference will be indulged that the dismissal was for failure to prosecute the action with reasonable diligence.

APPEAL from a judgment of the Superior Court of San Joaquin County. J. W. Hughes, Judge.

The facts are stated in the opinion of the court.

Woods & Levinsky, and Bruner & Bros., for Appellants.

R. Platnauer, and A. L. Shinn, for Respondents.

LORIGAN, J.—This is an appeal from a judgment dismissing the action, and is taken upon the judgment-roll alone. There is no bill of exceptions; hence we are not advised upon which particular ground the lower court ordered the dismissal. The judgment recites that "The court, after hearing the evidence adduced . . . and good cause appearing therefor, it is ordered that said motion be and the same is hereby granted."

Upon appeal every intendment is in favor of the validity of the judgment appealed from, and it is incumbent upon the party assailing it to show affirmatively that it is erroneous. Nothing towards that end appears in the record.

The superior court has power to dismiss an action upon several grounds (Code Civ. Proc., sec. 581), and it will be presumed, in the absence of any showing to the contrary, that the dismissal was ordered on some good ground, and that in ordering it the court properly exercised its power in conformity with the rules of law. (*Pardy v. Montgomery*, 77

Cal. 326.) One of the grounds upon which the lower court is authorized to dismiss an action is for failure to prosecute it with reasonable diligence, and from the record in this case a reasonable inference can be indulged in that it was for this reason the action was dismissed.

The judgment appealed from is affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[L. A. No. 1129. Department Two.—November 6, 1903.]

WINIFRED KEAN DONNELLY, Respondent, v. D. W. REES, and THOMAS O'BRIEN, Appellants.

ACTION BY HEIR TO SET ASIDE DEED—FRAUD AND UNDUE INFLUENCE UPON HABITUAL DRUNKARD.—An action may be maintained by the sole heir of a deceased person to set aside a deed procured from the deceased without consideration by the fraudulent practices of the defendants and their undue influence over the deceased, who was known to be an habitual drunkard for more than five years before the execution of the deed, to an extent seriously to impair his mind, and who was so intoxicated at the time as to render him unfit to transact business, and entirely incapable of realizing, understanding, or attending to the transaction.

ID.—EVIDENCE—DECLARATION OF GRANTOR—SILENCE OF DEFENDANTS.—

In such action a declaration of the grantor made in an affidavit in an attachment suit brought by his creditor, to the effect that the deed was not sham, or without consideration, or in fraud of creditors, was admissible, but not conclusive on the court; and where the affidavit was made in the presence of the defendants, and alluded to "a contemporaneous writing executed" by them, of which they say nothing in their testimony, their silence is a significant circumstance against them.

ID.—INVOLUNTARY TRUST—CONSTRUCTION OF CODE.—Where it appears that the defendants gained the land by actual fraud, and also by undue influence, and by the violation of an assumed trust, they are, under section 2224 of the Civil Code, involuntary trustees of the thing gained as against the heirs of the deceased grantor.

ID.—FRAUD UPON CREDITORS—GENERAL RULE INAPPLICABLE.—The general rule that a court of equity will not grant relief to one who

has made a deed to defraud creditors has no application where the deed was procured by fraud or undue influence of the defendants, who will not be allowed to perpetrate a greater fraud, and to take advantage of their own wrong and of the absence of free consent of the grantor, and who, under express statutory provision, take as trustees of the grantor.

1D.—EVIDENCE—HABITS AND CONDITION OF GRANTOR.—The objection that evidence was allowed as to the drunken habits and condition of the grantor, at periods from seventeen to twelve years prior to the date of the transaction, goes rather to the weight than to the admissibility of the testimony.

1D.—ACTION TO ENFORCE TRUST—RESCISSION NOT INVOLVED.—In an action to enforce an involuntary trust in favor of an heir of the deceased grantor, the objection that the grantor did not rescind promptly is untenable.

1D.—CHARGES NOT CONNECTED WITH TRANSACTION—PAYMENTS NOT REQUIRED.—The plaintiff was not required to make any payments on account of an alleged bill against the grantor, or for moneys alleged to have been advanced to him subsequently to the alleged transaction, where these matters cannot be regarded as connected with the transaction.

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order denying a new trial. John L. Campbell, Judge.

The facts are stated in the opinion.

R. F. Del Valle, and M. E. C. Munday, for Appellants.

Heirs cannot attack a deed executed to defraud creditors. (*Reichart v. Castator*, 5 Binn. 109;¹ *Terrell's Heirs v. Cropper*, 9 Martin, 350;² *Davis v. Swanson*, 54 Ala. 277.³) Mere ordinary drunkenness will not avoid a deed or contract. (*Pickett v. Sutter*, 5 Cal. 412; *Carender v. Waddington*, 5 Mo. App. 457; *Mansfield v. Watson*, 2 Iowa, 111; *Belcher v. Belcher*, 10 Yerg. 121; *Harbison v. Lemon*, 3 Blackf. 51;⁴ *Taylor v. Purcell*, 60 Ark. 606; *Henry v. Ritenour*, 31 Ind. 136; *Loftus v. Malony*, 89 Va. 576; *Johns v. Fritchey*, 29 Md. 258; *Bates v. Ball*, 72 Ill. 108.) Prompt rescission and restitution of consideration was necessary to avoid the deed, which may

¹ 6 Am. Dec. 402.

² 25 Am. Rep. 678.

³ 13 Am. Dec. 309.

⁴ 23 Am. Dec. 376.

be ratified when sold. (*Joest v. Williams*, 42 Md. 565;¹ *Carpenter v. Rogers*, 61 Mich. 384;² *Williams v. Walnek*, 1 Bail. 343; *Eaton v. Perry*, 29 Mo. 96; *Smith v. Williamson*, 8 Utah, 219.)

H. C. Rolfe, and Crawford & Clarke, for Respondent.

The parties were not *in pari delicto*, and the defendants are chargeable as being guilty of the greater fraud, and are chargeable in equity. (*Copeland v. Long*, (Tenn.) 41 S. W. 866, 872; *Ford v. Harrington*, 16 N. Y. 162; *Osborn v. Williams*, 18 Ves. 379; *Pinckston v. Brown*, 3 Jones Eq. 494; *Phalen v. Clarke*, 19 Conn. 420; *Freelove v. Cole*, 41 Barb. 318; *Sallee's Executor v. Sallee*, (18 Ky. Law Rep. 74) 35 S. W. 437; *Long v. Long*, 9 Md. 348; *Boyd v. Montagnie*, 73 N. Y. 498;³ *Boston v. Balch*, 69 Mo. 115; *Davies v. Otty*, 35 Beav. 208; *Rozell v. Van Sytle*, 11 Wash. 79; *Harper v. Harper*, 85 Ky. 100.) Rescission was not required. That is only one of the remedies the defrauded party may resort to. (*More v. More*, 133 Cal. 489; *Field v. Austin*, 31 Cal. 379; 1 Perry on Trusts, sec. 166; 2 Pomeroy's Equity Jurisprudence, secs. 1044, 1045, 1055; Civ. Code, sec. 2224.)

SMITH, C.—Appeal from a judgment for the plaintiff and from an order denying the defendants' motion for a new trial. The plaintiff is the daughter and sole heir of Patrick Kean, and brings this suit to set aside, as fraudulently obtained, a deed made by her father to the defendant—of date November 15, 1897. The land conveyed was an undivided half of certain mines owned by the former, and, it is found, was of the value of ten thousand dollars. The material questions in the case are presented by the second finding of the court, which is as follows:—

“That on the fifteenth day of November, 1897, and while said Patrick H. Kean was the owner of the half interest in the mining claims described and referred to in the complaint, the defendants fraudulently, and without any consideration, and by arts and importunities and by greater force of character and ascendancy over the mind of said Patrick H. Kean,

¹ 13 Am. Rep. 377.

² 1 Am. St. Rep. 595.

³ 29 Am. Rep. 197.

procured from him the deed of conveyance and transfer to them set out and described in the complaint, which deed was made while the said Kean was in a condition of intoxication and drunken imbecility and very weak in mind from the effects of the excessive drinking of intoxicating liquors to such an extent as to render him unfit to transact business and entirely incapable of properly realizing and understanding or attending to the said transaction. And for more than five years immediately before the making of said deed, the said Kean had been and was an habitual drunkard and constantly under the influence of the excessive drinking of intoxicating liquors, which were injurious to his mind so as to make him an easy prey to the arts and schemes of the defendants, which they exercised over him to induce him to execute said deed, and but for which he would not have done it."

Hence, rearranging the order of the findings, and stating merely their effect, the case presented may be briefly stated in four propositions, to wit: 1. For five years before the execution of the deed Kean had been an habitual drunkard to an extent seriously to impair his mind, and such as "to make him an easy prey to the arts and schemes" of defendants or other designing people; 2. He was in such a condition of drunkenness when he made the deed "as to render him unfit to transact business, and entirely incapable of realizing and understanding or attending to the said transaction"; 3. The deed was without consideration; and 4. It was procured by the fraudulent practices of the defendants, or, in the terms used in the findings, it was fraudulently procured by "the arts and importunities" or "arts and schemes" of the defendants, and by undue influence exercised over the grantor by them.

It is necessary only to consider the evidence bearing on the last finding, which consists of the facts found in the first, second, and third—all of which tend strongly to support it—and the testimony of Carroll; which is to the effect that the day before the transaction "Kean was speaking of transferring his mine for the purpose of evading" an anticipated attachment by one Monaghan (to whom it appears he was indebted in the sum of about one hundred dollars), and wanted him or his wife to accept the deed, which they declined to do. Thereupon the defendant Rees, who was present, asked Kean to make the transfer to him; and Kean consenting, a deed was

drawn up by the witness and executed by Kean, but, by reason of Kean's determining to put in another grantee with Rees, was not delivered. The parties then separated, and the defendant O'Brien, having been informed of the facts, told the witness he would like to get his name in the deed, and asked him "to use [his] influence with Kean to that end." In compliance with this request, the deed was drawn up by Carroll, who says he spoke to Kean about it, and used his influence to procure its execution, and the deed was accordingly executed. The defendants, the witness further testified, "both said they would return the property to Kean as soon as he was out of the woods," etc. But after the deed had been executed, he says, "They laughed; they said that was the last of the mine so far as Kean was concerned," etc. Carroll further testifies that Kean was drinking with the defendants during the transaction, and "three or four times" on the invitation of O'Brien; which, in view of Kean's general condition, and of his condition at the particular time, may have been regarded by the court as significant of fraudulent intent, and if the court so regarded it we cannot say it was not justified in doing so.

The defendants' account of the matter is somewhat different, but in view of the findings of the court need not be considered. The same observation is true of Kean's own declaration made in an affidavit in the Monaghan case, to the effect that the deed was not sham, or without consideration, or in fraud of creditors. This was admissible in evidence (Code Civ. Proc., sec. 1853), and if the facts had been doubtful, would have been cogent in its effect; but it was not conclusive on the court. It may be observed that this affidavit, which was made in the presence of the defendants, alludes to a "contemporaneous writing executed by" them, of which they say nothing in their testimony; which is a significant circumstance. (Code Civ. Proc., sec. 1963, subd. 5.)

On the facts found, the case comes within several of the provisions of section 2224 of the Civil Code, which, in view of other questions involved in the case, it may be important to distinguish: (1) The defendants gained the land by "*fraud*"—i. e. by actual fraud,—and also (2) by "undue influence," and are therefore—or, rather, each is—"an involuntary trustee of the thing gained"; and (3) the same result follows, because they gained the thing by "the violation of a trust." Upon

either of these principles, therefore, the plaintiff is entitled to recover, unless precluded—as is contended by the appellants—by the fact appearing from the testimony of Carroll, that the deed was made to defraud a creditor; with reference to which contention it is important to observe that the ground of relief under the first and second of the principles referred to is *fraud* and *undue influence* in procuring the original conveyance (*Brison v. Brison*, 75 Cal. 527¹); while under the third there is no fraud in the procurement of the instrument, but the fraud is one of those consisting “in the fraudulent use of instruments entered into upon a mutual confidence of the parties,” or, in other words, in violation of the trust voluntarily assumed in accepting the instrument. (Civ. Code, sec. 2219; *Pierce v. Robinson*, 13 Cal. 127; *Kimball v. Tripp*, 136 Cal. 634, 635; *Knight v. Tripp*, 121 Cal. 674; *Davies v. Otty*, 35 Beav. 213.)

Counsel for the respondent “do not deny the general rule that a court of equity will not grant relief to the person who has made a deed to [defraud] creditors,” and, for the purposes of the decision, this will be assumed to be the law; but their position is, that the rule has no application to a case like the present, where the deed was procured by undue influence or fraud of the defendants; and in this contention I think they are sustained by the authorities cited by them and by others. (Anson on Contracts, 159; Pomeroy’s Equity Jurisprudence, secs. 403, 942; Wharton on Contracts, sec. 353, p. 526; Pollock on Contracts, 332; Bump on Fraudulent Conveyances, sec. 436; Broom’s Legal Maxims, 701; Story’s Equity Jurisprudence, sec. 300; 14 Am. & Eng. Ency. of Law, 279; *Tracy v. Talmage*, 14 N. Y. 181;² *St. Louis R. R. Co. v. Terre Haute R. R. Co.*, 145 U. S. 406, and authorities cited; *Michaels v. Hain*, 78 Hun, 499, 500.) The application of the principle is illustrated by the numerous cases cited in respondent’s brief, and also by the decision of this court in the case of *Vitoreno v. Corea*, 92 Cal. 69, which in principle cannot be distinguished from the case at bar.

The reason of the rule is variously given in the authorities cited; and all the reasons given are good. Commonly it is said merely that the parties are not *in pari delicto*—the offense of the party imposed upon being trivial in comparison with

¹ 17 Am. St. Rep. 189.

² 67 Am. Dec. 132, and nota.

that of the other, who is not only guilty of the fraud common to the two, but of a more heinous fraud, in which he alone participates. Another statement of the rule is, that it is founded on "the necessity of preventing imposition," or, as otherwise expressed, "of preventing the perpetration of a greater fraud by the grantee" (Bump on Fraudulent Conveyances, sec. 436), which is also a weighty consideration. For otherwise the rule would in effect hold out a reward to designing persons, who would find in its operation a ready means of defrauding others; of which the case at bar furnished an instructive illustration. Again, it is said: "If the superior should be allowed immunity under such circumstances, he would be permitted to take advantage of his own wrong" (14 Am. & Eng. Ency. of Law, 279); which would be in violation of the fundamental principle of the law embodied in the maxim, *Nullum commodum capere potest de injuria sua propria*. (Coke on Littleton, 148b, cited in Broom's Legal Maxims, 275.) For, it is said, "No man shall set up his own iniquity as a defense, any more than as a cause of action." (*Montefiori v. Montefiori*, 1 W. Blackstone, 262, 263.) Finally it is said in the Encyclopedia at the place cited: "The wrong [in such case] rests chiefly, if not solely, on the superior, by whom it will be presumed it was contrived, and the inferior will be regarded as a mere instrument for accomplishing an end not his own"; which is in effect to put the rule on the ground that in such cases the consent of the party imposed on is not free. (Civ. Code, secs. 1567, 1572, 1575.) All of these reasons are satisfactory; but it may be observed especially that the case here comes clearly within the last, which is the narrowest, of the grounds assigned for the rule. It may be added that the principle applies *a fortiori* in this case, where, by express statutory provisions containing no qualifying or excepting words, "one who gains a thing by fraud . . . [or] undue influence" takes as trustee for the grantor. (Civ. Code, sec. 2224.)

Other points urged by appellants may be briefly disposed of. These are, that Kean did not rescind promptly, and that it was error to allow testimony as to the habits and condition of Kean at periods from seventeen to twelve years prior

to the date of the transaction. But the last objection affects rather the weight than the admissibility of the testimony (Code Civ. Proc., secs. 1832, 1957, 1960, subd. 2); and the former contention is also untenable. (*More v. More*, 133 Cal. 489; *Field v. Austin*, 131 Cal. 379; Civ. Code, secs. 3406 et seq.) It was not necessary that the plaintiff should pay to the defendants the amount of their alleged bill, or to O'Brien the amounts alleged to have been advanced to Kean subsequently to the transaction; or that the court should so adjudge under the findings—which we have held to be sustained by the evidence. These matters cannot be regarded as being connected with the transaction.

We advise that the judgment and order appealed from be affirmed.

Chipman, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Henshaw, J., McFarland, J., Lorigan, J.

[L. A. No. 1120. Department Two.—November 6, 1903.]

NELLIE SWETT, Appellant, v. JOHN A. GRAY, Respondent.

MOTION FOR NEW TRIAL—AMENDMENTS OF STATEMENT—CURE OF DEFECTIVE SPECIFICATIONS—DISCRETION OF JUDGE.—Amendments to the statement on motion for new trial to cure defective specifications, and to embody the question, answer, objection, and ruling in each instance as shown by the record, instead of referring to them only by number, were properly allowed in the discretion of the judge, under section 659 of the Code of Civil Procedure.

ID.—NOTICE OF MOTION TO AMEND—APPELLANT NOT INJURED.—The appellant was not injured because not served with notice of the motion to amend the statement, if served with notice of the proposed amendments, and, being present at the hearing of the motion, of-

ferred no further amendments, and did not object to the matter proposed to be added, but merely objected generally to any amendment.

ID.—AMENDMENTS TREATED AS PART OF STATEMENT—ABSENCE OF RE-ENGROSSMENT.—Where the minutes of the court show that the amendments to the statement were allowed, and that they were before the court when the motion for a new trial was passed upon, and were referred to in the motion, and were considered by the court in passing upon the motion, and were treated both by the court and by the parties as part of the statement, although not re-engrossed as would have been proper, no injury was done to appellant by the amendments, or by failure to embody them in a re-engrossed statement, and they may be considered as part of the statement.

ID.—JURISDICTION TO DETERMINE MOTION—PROPER SPECIFICATIONS.—Where, besides the defective specifications sought to be cured by the allowed amendments, there were other specifications in the engrossed statement amply sufficient to point out the particulars in which it was claimed the court was authorized to grant a new trial, the court clearly had jurisdiction to determine the motion.

ID.—CONDITIONAL ORDER GRANTING NEW TRIAL—ACTION FOR SEDUCTION—REMISSION OF DAMAGES.—The court had power in an action for seduction to make a conditional order granting a new trial after judgment for the plaintiff unless the plaintiff should remit a portion of the damages. Such order does not necessarily assume that the order was made on the ground of passion and prejudice having influenced the verdict.

ID.—GROUNDS OF ORDER—CONFLICTING EVIDENCE.—Where the record does not disclose the ground of the conditional order granting a new trial, it may be sustained upon any ground assigned; and where there was conflicting evidence as to whether the defendant was guilty of the seduction charged, as to the previous good character of the plaintiff for chastity, truth, and veracity, and as to the amount of damages, and there were specifications of insufficiency of the evidence to justify the verdict in these respects, it cannot be said that the court erred in making the order appealed from.

ID.—SUFFICIENCY OF COMPLAINT—NEW TRIAL.—The question of the sufficiency of the complaint cannot be considered on motion for a new trial, where there is no appeal from the judgment.

ID.—APPEAL FROM CONDITIONAL ORDER—REFUSAL OF REMISSION—EXERCISE OF OPTION.—Where the appellant by appeal from the conditional order in effect refused to remit any part of the judgment, or to abide by the terms of the order, the appeal was an exercise of the appellant's option, and this court will not upon affirming the order granting a new trial fix any time within which such remission may be made.

APPEAL from an order of the Superior Court of Riverside County granting a new trial. Lucien Shaw, Judge presiding.

The facts are stated in the opinion.

Gibson & Gill, for Appellant.

The verdict of the jury should not have been interfered with by the judge, the amount not being so grossly excessive as to shock the moral sense and raise a presumption of passion and prejudice. (*Wilson v. Fitch*, 41 Cal. 363; *Howland v. Oakland etc. Ry. Co.*, 110 Cal. 523; *Harris v. Zanano*, 93 Cal. 71, 72; *Mise v. Hecht*, 130 Cal. 630.) The specifications in the statement were insufficient to justify the order. (*Hall v. Susskind*, 120 Cal. 559, 566; *McLeman v. Wilcox*, 126 Cal. 52; *Taylor v. Bell*, 128 Cal. 307.) There was no engrossment of the amendment allowed, and the statement being unsettled, the court had no jurisdiction to determine the motion. (*Hart v. Burnett*, 10 Cal. 65; *Warner v. Thomas etc. Works*, 105 Cal. 412; *People v. Southern*, 118 Cal. 360; *Lucas v. Mayor, etc.*, 44 Cal. 210.)

Kendrick & Knott, John G. North, Byron L. Oliver, Hartley Shaw, and Byron Waters, for Respondent.

The order as made was within the discretion of the trial court, and the order will be sustained on any ground assigned, including insufficiency of evidence. (*Domico v. Casasa*, 101 Cal. 413; *Breckenridge v. Crocker*, 68 Cal. 403; *Nally v. McDonald*, 77 Cal. 284; *Harnett v. Central Pacific R. R. Co.*, 78 Cal. 33; *Anglo-Nevada etc. Corporation v. Ross*, 123 Cal. 522; *Mills v. Oregon etc. Co.*, 102 Cal. 359; *Warner v. Thomas etc. Works*, 105 Cal. 411; *In re Martin*, 113 Cal. 481; *Kauffman v. Maier*, 94 Cal. 269.) Overestimate of damages for any other cause than passion or prejudice is ground for a new trial or reduction of verdict for insufficiency of the evidence. (*Etchar v. Orena*, 121 Cal. 270; *Dahntz v. Jessup*, 54 Cal. 119; *Bennett v. Hobro*, 72 Cal. 179; *Doolin v. Omnibus Cable Co.*, 125 Cal. 144.) The specifications as to insufficiency of the evidence were sufficient to enable the adverse party to insist upon all evidence bearing upon the point going into the statement. (*American Type*

Founders' Co. v. Packer, 130 Cal. 459.) The order from which the appeal is taken shows that the amendments to the statement were allowed, and the motion was made upon the settled statement and amendments. The amendments are entitled to consideration here. (*Valentine v. Stewart*, 15 Cal. 387; *Loucks v. Edmondson*, 18 Cal. 203; *Low v. McCallan*, 64 Cal. 2.) The order granting the new trial became absolute for refusal of appellant to accept the condition. (*Sherwood v. Kyle*, 125 Cal. 652; *Brooks v. San Francisco etc. R. R. Co.*, 110 Cal. 177; *Davis v. Southern Pacific Co.*, 98 Cal. 13.)

CHIPMAN, C.—Seduction. The cause was tried by a jury, and plaintiff had the verdict assessing “the amount of damages at the sum of eight thousand two hundred and fifty dollars, as compensatory damages, and five thousand and fifty dollars as exemplary damages.” Judgment was entered that plaintiff recover from defendant “the sum of thirteen thousand and three hundred dollars,” and costs assessed, etc. Defendant moved for a new trial, and on hearing the motion the court, on May 4, 1901, “ordered that a new trial be granted, unless plaintiff, within ten days, in writing, remits all of the judgment in excess of \$5,000, and if plaintiff shall remit the sum of \$8,300 from the judgment within ten days, then and in that case the motion for a new trial will be denied.” Plaintiff did not remit any part of the judgment, but on May 10, 1901, without waiting the ten days mentioned in the order, served notice of appeal from this order and now contends: 1. That the “trial court did not exercise a proper legal discretion in granting a new trial,” on the terms stated; and 2. That the court had no jurisdiction to determine the motion, and the order is therefore void.

1. As to the second of these points, the first calling for attention, the jurisdiction of the court is challenged on two grounds: 1. The specifications of insufficiency of the evidence to justify the verdict are themselves insufficient, and are inapplicable where a new trial is sought on the ground of damages given through passion or prejudice; and 2. Because the court allowed the amendments to the proposed statement at the hearing of the motion after the statement had been settled and signed by the judge. The proposed statement

was settled and allowed and signed by the judge on February 27, 1901. On March 1, 1901, defendant, by his counsel, filed certain amendments to the proposed statement. These amendments are indorsed by the clerk: "Received for the judge who tried the cause this 6th day of February, 1901," and on the same day a copy was served on plaintiff's counsel and acknowledged by them. No objection to the proposed amendments was noted in the acknowledgment. On May 4, 1901, as shown by the minutes of the court, counsel for defendant "moved the court for an order granting leave to file amendments to statement on motion for new trial." Plaintiff objected "on the ground that plaintiff has had no notice of the motion. Objection overruled and motion granted. Plaintiff excepts." Defendant then moved for a new trial "on the grounds set forth in his statement on motion for a new trial and the amendments thereto." This motion was argued by respective counsel without further objection by plaintiff, and the court made the order already noticed. We have what purport to be the minutes of the court, made at the time the motion for a new trial was argued and passed upon. These minutes show that the proposed amendments were before the court at the time that motion was before it, and were then allowed, and they were referred to in the motion for a new trial, made at the same time the amendments were allowed. I think it sufficiently appears that the proposed amendments were considered by the court in making the order appealed from and the record made of the proceedings then had may be considered here. Appellant was not injured because not previously served with notice of the motion to amend the statement. She had actual notice of the proposed amendments by service of them upon her counsel two months before the motion. At the hearing of the motion she offered no amendments and did not object to the matter proposed to be added to the statement, but objected generally to any amendment. The specifications in the notice of the motion failed to state the ruling on certain questions and answers of witnesses duly objected to by defendant, but referred to them only by number. The amendments embodied the question, answer, objection, and ruling in each instance as shown by the record, and were in fact amendments of the specifications in the notice of the motion. The amendments

were proper under section 659 of the Code of Civil Procedure, and it was within the discretion of the judge to allow them. (*Warner v. Thomas etc. Works*, 105 Cal. 409. Upon the question of notice, see *People v. Southern*, 118 Cal. 359.) It is urged by appellant, however, that the statement should have been re-engrossed, with the amendments embodied in the re-engrossment, and then recertified by the judge, and this not having been done, there is no statement before the court, and the order was without authority. If these amendments were improperly allowed, the effect would not necessarily be to vacate the already settled statement, but would simply leave the original statement undisturbed as previously settled. The proper course perhaps would have been as taken in *Warner v. Thomas etc. Works*, 105 Cal. 409,—namely, to move the court to vacate the settlement and allowance of the statement, with leave either to re-engross the same and place the proposed amendments therein or to have them deemed to be so re-engrossed, settled, and allowed. As we have seen, however, the amendments were treated by the court and by the parties as part of the statement. No injury was done to plaintiff, either by the amendments thereto or failing to embody them in a re-engrossed statement, and we think they may be considered as part of the statement. It cannot be said, therefore, that the court made the order without having any statement before it, as claimed by appellant. (See *Valentine v. Stewart*, 15 Cal. 387; *Loucks v. Edmondson*, 18 Cal. 203; *Low v. McCallan*, 64 Cal. 2. See, also, Hayne on New Trial, p. 476.)

Upon the other objection we think the specifications without the amendments clearly fall within the rule laid down in *American Type Founders' Co. v. Packer*, 130 Cal. 459. There were defective specifications, but there were others amply sufficient to point out the particulars in which it is claimed the court was authorized to grant a new trial.

2. The remaining point relied on by appellant is, that the court had no authority to make the order reducing the judgment, and the discussion of the point by appellant proceeds upon the erroneous assumption that the trial court made the order on the ground of passion or prejudice having influenced the verdict. The motion was made on most of the statutory grounds, including insufficiency of the evidence to justify the

verdict, and that the verdict is against law, but did not include subdivision 5 of section 657 of the Code of Civil Procedure,—namely, “Excessive damages appearing to have been given under the influence of passion or prejudice.” The order does not disclose, and nothing in the case shows the ground on which it was made. But if it had done so, this court will review the entire record upon which the order is based, and the order will be affirmed if any error be found which would have justified the court in making it; and so, also, where the order was silent as to the ground on which it was made. (*Kauffman v. Maier*, 94 Cal. 269; *People v. Flood*, 102 Cal. 330; *Tibbetts v. Bower*, 121 Cal. 7; *Anglo-Nevada etc. Corporation v. Ross*, 123 Cal. 520.) It was said in *Sherwood v. Kyle*, 125 Cal. 652, the action being for slander: “Except where one ground is as to the sufficiency of the evidence, and this only as to the ruling upon that one point, it is utterly immaterial here upon what ground the new trial was granted. The respondent may defend the ruling upon any point involved in his motion.” It was also said in this case: “The power of the court to make a conditional order of this character is thoroughly settled in this state.” Where the order is made by the court on the ground that the damages were given under the influence of passion or prejudice, as was the case in *Sherwood v. Kyle*, 125 Cal. 652, the rule is stated to be as claimed by appellant,—namely, “The judge should not grant a new trial merely because he deems the verdict excessive, unless it is so excessive as to indicate that it was the result of passion or prejudice.” But where the court makes the order without assigning the ground on which it was made, the order, as we have seen, may be supported upon any point involved in the motion. If the court excludes the ground of insufficiency of the evidence by direct language, and the record shows a conflict of evidence, “the court, upon the same principle that caused it to affirm an order granting or denying a new trial upon that ground, will accept the conclusion of the trial court and not re-examine the evidence.” (*Kauffman v. Maier*, 94 Cal. 269.) That the evidence is insufficient to justify the verdict or other decision is a ground distinct from that of damages appearing to have been given under the influence of passion or prejudice, and the court may grant a new trial where in its judgment the evidence is insufficient

to justify the verdict without regard to the question as to whether the verdict was the result of passion or prejudice; and "as the granting or denying a motion for a new trial upon the ground that the decision or verdict was contrary to the evidence is largely within the discretion of the trial court, its action will not be reversed unless its discretion in this respect has been abused, whether this be the only ground upon which the motion is made or only one of the several statutory grounds." (*People v. Flood*, 102 Cal. 330.) In the present case there was a conflict upon the question as to whether defendant was guilty of the seduction charged; there was conflict as to the previous good character of the plaintiff for chastity, as to her character for truth and veracity, as to the evidence touching the amount of damage,—plaintiff testifying that she was ruptured and her attending physician testifying that there was no rupture. Upon the record before us we cannot say that the court erred in making the order.

3. The question of the sufficiency of the complaint cannot be considered on motion for new trial where there is no appeal from the judgment. (*Swift v. Occidental Mining Co.*, (Cal.) 70 Pac. 470.) Plaintiff appealed from the order before the ten days had expired, during which time she was given an option to remit a part of the judgment, and by so doing the order would have stood denied. She now asks that if the judgment be affirmed "that this court designate and fix in its judgment and decision a reasonable time within which plaintiff may, if she shall desire so to do, make such remission as specified in said order of the said superior court." The appeal, in effect, was a refusal by plaintiff to remit any portion of the judgment or abide by the terms of the order, and was an exercise of her option.

We do not think she should be permitted to appeal here on the assumption that she had all to gain and nothing to lose by the course taken.

It is advised that the order be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

[L. A. No. 1397. In Bank.—November 7, 1903.]

**KATHERINE TINGLEY, Appellant, v. HARRISON GRAY
OTIS et al., Respondents.**

ORDER CHANGING PLACE OF TRIAL—APPEAL—INSUFFICIENT RECORD—DISMISSAL.—Upon appeal from an order changing the place of trial, where a bill of exceptions settled without notice has been stricken from the files of the superior court, and by this court from the transcript on appeal, leaving nothing but the notice of appeal and the clerk's certificate as to the undertaking, it is the duty of this court to dismiss the appeal of its own motion, without considering a motion to dismiss it for failure of appellant to serve and file points and authorities.

MOTION to dismiss an appeal from an order of the Superior Court of San Diego County granting a change of the place of trial. N. H. Conklin, Judge.

The facts are stated in the opinion.

A. B. Hotchkiss, and F. Shay, for Appellant.

Eugene Daney, Hunsaker & Britt, and D. M. Hammack, for Respondents.

VAN DYKE, J.—This is an appeal by plaintiff from an order granting the defendants' motion for a change of the place of trial from the county of San Diego to the county of Los Angeles.

Defendants moved to dismiss said appeal on the ground that the appellant had not served or filed printed points and authorities within thirty days after the filing of the transcript, as required by the rules of this court. That motion was argued and submitted July 6, 1903. Thereafter, October 19, 1903, at the Los Angeles term of court, respondents, pursuant to notice given, moved to strike from the printed transcript that portion purporting to be a bill of exceptions settled by the lower court, on the ground that the bill of exceptions was presented and settled without notice, and that since the filing of the transcript said superior court had canceled the certificate of allowance, and stricken the bill of

exceptions from the files of the lower court, which motion was by this court, on October 20th, granted.

The bill of exceptions having been stricken from the transcript, nothing remains before this court except the notice of appeal and the certificate of the clerk of the court below that an undertaking on said appeal in due form had been filed. Without considering the motion to dismiss, based upon the technical ground of failure on the part of the appellant to serve printed points and authorities, it would be the duty of the court of its own motion, in the present condition of the record, to dismiss the appeal; and it is so ordered.

Shaw, J., Angellotti, J., Lorigan, J., McFarland, J., and Beatty, C. J., concurred.

[S. F. No. 3713. In Bank.—November 16, 1903.]

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

ESTATES OF DECEASED PERSONS—DECREE OF DISTRIBUTION—DISCHARGE OF ADMINISTRATRIX—TIME FOR APPEAL—DISMISSAL.—The time for an appeal from probate orders, judgments, and decrees is limited by section 1715 of the Code of Civil Procedure to sixty days from the date of entry. This court has no jurisdiction of appeals from a decree of distribution or from a decree of final discharge of an administratrix, taken more than sixty days after their entry; and such appeals will be dismissed.

MOTION to dismiss appeals from a decree of distribution of the Superior Court of Santa Clara County and from a decree discharging an administratrix with the will annexed. M. H. Hyland, Judge.

The facts are stated in the opinion of the court.

H. L. Gear, Charles W. Slack, and J. J. Dunne, for Appellant.

The decree of distribution appealed from in this case by heirs of the decedent is a final judgment for the direct pay-

ment of money to trustees under the will, in pursuance of a trust which is void in its creation, as suspending the power of alienation beyond heirs in being. (*Estate of Walkerly*, 108 Cal. 627, 657-658.¹) It is a "final judgment in a special proceeding," within the express terms of section 939 of the Code of Civil Procedure, and is appealable as such within six months from the date of entry. Section 1715 should be construed, in principle, as applicable only to appeals in probate proceedings which are not from final judgments; and any case to the contrary should be overruled. Construction should favor the right of appeal. (*Appeal of Houghton*, 42 Cal. 51, 52; *San Francisco v. Certain Real Estate*, 42 Cal. 518; *Converse v. Burrows*, 2 Minn. 229; *Pearson v. Lovejoy*, 53 Barb. 407.) Statutes and the code are to be construed so as to give effect to each part. (*Chever v. Hazen*, 5 Cal. 169; *San Francisco v. Hazen*, 31 Cal. 412; *Langenour v. French*, 34 Cal. 92; *Gates v. Salmon*, 35 Cal. 576;² *People v. Southwell*, 46 Cal. 141; *McGary v. Pedrorena*, 58 Cal. 91.)

C. T. Bird, for Respondent.

The appeals must be dismissed. (Code Civ. Proc., sec. 1715; *Estate of Wiard*, 83 Cal. 619, and cases in which it is cited; *In re Walkerly*, 94 Cal. 353; *In re Backus*, 95 Cal. 672; *In re Heldt*, 98 Cal. 553; *In re Smith*, 98 Cal. 639; *Estate of Wittmeier*, 118 Cal. 256.)

THE COURT.—Decrees were entered herein making final distribution in February, 1903, and discharging the administratrix with the will annexed in April, 1903. Notices of appeal from these decrees were served August 15th following,—more than sixty days after their entry. Respondent moves to dismiss the appeals upon the ground that the notices were not served in time.

The motion must be granted. The time for appealing from probate orders, judgments, and decrees is limited by section 1715 of the Code of Civil Procedure to sixty days from date of entry, and this court has no jurisdiction of an appeal attempted after the lapse of that time. The decisions to this effect are numerous, and the language of the statute is plain.

¹ 49 Am. St. Rep. 97, and note. ² 95 Am. Dec. 139.

(See *Estate of Wiard*, 83 Cal. 619, and the numerous cases in which that decision has been cited and followed.)

The appeals are dismissed.

[Sac. No. 1017. Department One.—November 20, 1903.]

KATE BORIES, Appellant, v. UNION BUILDING AND LOAN ASSOCIATION, and T. W. O'NEIL and L. HEILBRON, as its Trustees and Receivers, Respondents.

BUILDING AND LOAN ASSOCIATION—ATTACHMENT LIEN—REPORT OF COMMISSIONERS TO ATTORNEY-GENERAL—SUBSEQUENT ACTION.—The property of a building and loan association is subject to attachment by any creditor thereof, at any time prior to the commencement of an action by the attorney-general to enjoin it from doing business; and the lien of an attachment upon its real estate is not affected by a prior report of the commissioners to the attorney-general that the association was doing business in an unsafe manner.

ID.—SUBSEQUENT POSSESSION OF RECEIVERS—EXISTING LIENS NOT AFFECTED.—The subsequent possession of receivers appointed by the court cannot affect the existing lien of the attachment. The appointment of a receiver works no injury to the least right of any one; but the receiver is the hand of the law, which preserves and enforces rights, and never destroys them. The receiver's possession is subject to all valid and existing liens upon the property at the time of his appointment.

APPEAL from an order of the Superior Court of Sacramento County dissolving an attachment. J. W. Hughes, Judge.

The facts are stated in the opinion.

M. S. Wahrhaftig, for Appellant.

A. M. Johnson, and Devlin & Devlin, for Respondents.

HAYNES, C.—Plaintiff appeals from an order dissolving her attachment levied upon real estate of the said association

in her action upon a money demand. The transcript contains a bill of exceptions. There is no controversy as to the material facts relating to the validity of the attachment.

On December 14, 1897, the state board of commissioners of building and loan associations made an investigation of the affairs and condition of the defendant Union Building and Loan Association, a corporation, and on January 24, 1898, reported to the attorney-general that said association was "transacting an unsafe business," and on January 26th, notified the association that it had so reported to the attorney-general. On February 7, 1898, that officer, on behalf of the people, commenced an action against said association, pursuant to the provisions of the act creating said board of commissioners (Stats. 1893, p. 229), and on February 24, 1898, judgment was entered enjoining the said association from the further transaction of business, and appointing a receiver. Upon appeal this court affirmed the judgment, except as to the appointment of the receiver, and as to said appointment the judgment was reversed. (*People v. Union Banking Assn.*, 127 Cal. 400.) Afterwards, in an action brought by a member of the association, the defendants O'Neil and Heilbron were appointed trustees and receivers to liquidate the business and affairs of the association, and it was upon their motion that plaintiff's attachment was dissolved.

The action in which said attachment was issued was brought by plaintiff on January 21, 1898, and the attachment was levied January 31, 1898, on real estate of the defendant association. The association had suspended business in December, 1897.

The only grounds upon which respondents rely to sustain the action of the court in dissolving appellant's attachment, have their basis in the examination of the affairs and condition of the association by the state board of commissioners, and their report to the attorney-general thereof, and the action of the court taken upon his complaint under the provisions of said act of 1893, creating said board of commissioners.

Said report of the board of commissioners to the attorney-general is as follows:

"The Union Building and Loan Association of Sacramento is conducting its business in an unsafe manner, such as to

render its further proceeding hazardous to the public and to those having funds in its custody."

Said examination was made (or commenced) December 14, 1897, but no report was made to the attorney-general until January 24, 1898, and appellant's action was commenced three days before that date, and her attachment was issued and levied seven days before his complaint was filed. But the length of time that elapsed after the levy of the attachment before said action was commenced by the attorney-general is immaterial, since the property of the association remained subject to attachment or execution at least until the commencement of that action. Whether it remained so liable until its sequestration by the appointment of a receiver need not, in this case, be considered. But neither the appointment of a receiver in that case nor the subsequent appointment of respondents Heilbron and O'Neil as receivers affects the lien of appellant acquired before the action was commenced. In *Lanz v. Fresno etc. Bank*, 125 Cal. 458, it is said: "In this case it nowhere appears that any proceedings have ever been taken by the bank commissioners and the attorney-general resulting in the judicial declaration contemplated by the Banking Act; and until such action is taken, the bank's legal status as to its creditors is not changed. . . . We conclude that in the absence of the judicial declaration contemplated by the Banking Act, the right of action against the bank by creditors stands exactly as though its doors had never been closed and its business was progressing in the usual and ordinary channels."

Von Roun v. Superior Court, 58 Cal. 358, arose under the Insolvency Act (Stats. 1880, p. 82). In that case it appeared that an order directing the sheriff to take charge, etc., was made on January 4, 1881. Von Roun had brought suit and procured a writ of attachment therein to be levied on certain property by the sheriff, and on the 8th the sheriff was ordered to turn over to the receiver the attached property then in his hands. This court said: "It seems to be the impression of counsel for the applicants for the writ of review that they have a lien acquired by the levy of the writ of attachment on the property seized which will be lost if the property is turned over to the receiver. This is an entire misapprehension of the law. The appointment of a receiver works no in-

jury to the least right of any one. It would be strange if it did. The receiver is the hand of the law, and the law conserves and enforces rights—never destroys them. His appointment determines no right, and in no way affects the title of any party to the property in litigation” (citing numerous cases). “If the applicants have any lien the receiver holds the property subject to such lien as fully as did the sheriff; and if such property is sold by the receiver, whatever lien exists attaches to the proceeds.”

In *High on Receivers* (sec. 138), it is said: “It is important to observe that the receiver’s possession is subject to all valid and existing liens upon the property at the time of his appointment, and does not divest a lien previously obtained in good faith.”

Respondents rely, however, upon the case of *Crane v. Pacific Bank*, 106 Cal. 64, where this court affirmed an order dissolving an attachment levied upon the assets of the bank by Crane, a creditor who was a depositor. That case involved a construction of the Bank Commissioners’ Act, which in some of its features is similar to the act creating the board of commissioners of building and loan associations; but the two acts are materially different, not only as to the powers and duties of the respective boards, but as to the character and importance of the corporations to which they relate.

In *People v. Superior Court*, 100 Cal. 114, speaking of section 11 of the Bank Commissioners’ Act, it was said: “We have no doubt that this section was intended by the legislature to provide for every case involving the winding up of the business of a banking corporation, and that it necessarily supersedes the provisions of the Insolvent Act of 1880, so far as this class of corporations is concerned.” And again, “The statute is essentially one of bankruptcy in relation to this class of corporations.” Under said act said bank commissioners are constantly charged with the duties of examination, and of a limited direction during the business life of the bank and the supervision of its liquidation when its life ends in insolvency. The commissioners of building and loan associations have no similar power except that of examination and reporting to the attorney-general.

It is not necessary, however, to enlarge upon the distinctions between the powers and duties of these two boards, since

the legislature has given an emphatic expression upon the subject since the case of *Crane v. Pacific Bank*, 106 Cal. 61, was decided.

The Bank Commissioners' Act was passed in 1878 (Stats. 1877-1878, p. 740), and was amended March 10, 1887, (Stats. 1887, p. 90,) and the said amended act was in force when *Crane v. Pacific Bank*, 106 Cal. 64, was decided. The act creating the board of commissioners of building and loan associations was enacted March 23, 1893, (Stats. 1893, p. 229,) section 9 of which act corresponded in some material respects to section 11 of the Bank Commissioners' Act. The last-named act was, however, again amended March 26, 1895, (Stats. 1895, p. 172,) and section 11 of the amended act contains, among others, the following provision: "The issuance of the injunction hereinabove provided for shall, by operation of law, dissolve any and all attachments levied upon any property of such corporation within one month next preceding the date of notification of the commissioners to the attorney-general, as provided for in this section, and no attachment or execution shall, after the issuance of such injunction, and during the process of liquidation hereinafter provided for, be levied upon any property of said corporation, nor shall any lien be created thereon."

On the same day (March 26, 1895), the act creating said board of commissioners of building and loan associations was also amended, but section 9 of that act was unchanged, nor was there in the act so amended any provision such as that above quoted, nor any prohibition against acquiring liens upon the property of such associations by attachment or otherwise. These amendments, passed by the same legislature, on the same day, and doubtless considered by the same committee, we think conclusively show the legislative intent to leave the property of such associations subject to attachment and other liens acquired prior to the commencement of the action by the attorney-general. The act gives no effect to the examination made by the board of commissioners. The board cannot give any order or direction to the corporation, nor give notice of the condition of the association to creditors, nor is it compulsory upon the attorney-general to bring suit. If respondents' contention is sound, until suit is brought the association may continue its business, borrow money, contract

debts, sell its property, though insolvent, while a creditor is denied the right to resort to the writ of attachment to secure payment of his just demands. It is well settled that the property of insolvent private corporations is subject to attachment—a fact distinctly recognized by the amended Bank Commissioners' Act—and we see no ground to distinguish between building and loan associations and other private corporations in this regard in the absence of a statute creating a distinction either by express provisions or by necessary implication.

It follows that the real estate attached by appellant is charged in the hands of the receiver with her attachment lien, and that the order dissolving the attachment should be reversed.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed.

Shaw, J., Angellotti, J., Van Dyke, J.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[SAC. NO. 1132. DEPARTMENT ONE.—NOVEMBER 20, 1903.]

KATE BORIES, Claimant, Appellant, v. UNION BUILDING AND LOAN ASSOCIATION, T. W. O'NEIL, and L. HEILBRON, Receivers and Trustees, HERMAN STEINMAN et al., Creditors, and J. C. DEVINE, Stockholder-Plaintiff, Respondents.

BUILDING AND LOAN ASSOCIATION—ATTACHMENT LIEN—COSTS—INJUNCTION—PETITION OF STOCKHOLDER—RECEIVERS.—An attachment upon a note of a building and loan association, levied upon its land, before the commencement of an injunction suit by the attorney-general to restrain its business, creates a valid lien for the amount of the note and costs of suit, which is not affected by the injunction

suit; and subsequent receivers appointed upon petition of a stockholder of the association to wind up its business, took the attached property charged with the lien of the attachment.

ID.—SALE OF ATTACHED PROPERTY—LIEN UPON PROCEEDS—PRO RATA DISTRIBUTION.—Upon a sale of the attached property by the receivers, the proceeds were still charged with the lien for the amount of the note and costs of the attachment suit, and must be applied by the receivers in payment thereof in full, if sufficient; and the claimant of the lien can only be made to share with unsecured creditors in a *pro rata* distribution of assets, as to the amount of any unsecured deficiency.

ID.—IMPROPER DISTINCTION AS TO CLAIMS—MONEY LOANED—NOTE FOR DEBT—ERRONEOUS JUDGMENT.—There is no ground for the distinction in the judgment of the superior court in allowing claims in full for "cash money loaned" to the association, and in rejecting the validity of the attachment levy of appellant upon a note given in discharge of a debt or liability of the association for a given sum, due for the surrender of stock worth the face value of the note, and ordering the note paid *pro rata* with other creditors, after full satisfaction of all claims for cash money loaned to the corporation. The court was not justified in putting all claims for money loaned in a preferred class to be paid in full.

APPEAL from a judgment of the Superior Court of Sacramento County. J. W. Hughes, Judge.

The facts are stated in the opinion.

M. S. Wahrhaftig, for Appellant.

A. M. Johnson, for Thomas W. O'Neil, Receiver, Respondent.

Devlin & Devlin, for L. Heilbron, Receiver, Respondent.

Hiram W. Johnson, for Plaintiff-Respondent.

H. C. Ross, Hinkson & Elliott, Prewett & Henderson, R. Platnauer, A. L. Shinn, A. E. Miller, Frank Brown, W. A. Gett, and Isaac Joseph, for various Creditors, Respondents.

HAYNES, C.—This is an appeal by Kate Bories from parts of a judgment entered in the above-entitled action, or proceeding, taken upon the judgment-roll and bill of exceptions.

Appellant, on January 21, 1898, commenced an action upon a promissory note executed by said building and loan association in 1896, and in said action on January 31, 1898, attached real estate of said defendant. On February 7, 1898, in an action commenced by the attorney-general, said association was found to be insolvent, and was enjoined from the further transaction of business, and a receiver was appointed. On appeal that part of the judgment appointing a receiver was reversed. (*People v. Union Building and Loan Assn.*, 127 Cal. 400.) After said reversal, upon the petition of a stockholder, receivers were appointed.

Afterwards, pursuant to an order of the court requiring claimants to present their claims for adjudication, appellant presented her claim, for the amount due on the obligation sued upon and costs. Appellant presented her claim, reserving, however, all rights under her attachment; and upon the hearing of her claim the court found the execution and delivery of the note, that it was executed in consideration of a valid claim against the association, that at the time her action was brought, and the attachment levied, the defendant corporation was being investigated by the board of commissioners, and was found by said board to be conducting an unsafe business, that the attorney-general brought an action against the corporation, and in said action an order was made enjoining it from continuing its business, and appointing a receiver to wind up its affairs.

As conclusions of law, the court found her claim for principal and interest to be valid; that she should be paid said sum of fifteen hundred dollars with interest, "in the course of liquidation *pro rata* with other creditors, after payment in full for claims against said defendant corporation for cash money loaned to said corporations, and that said attachment was illegally levied and therefore void, and that claimant is not entitled to costs incurred in her said action," and judgment was entered accordingly. This appeal is taken by Kate Bories, the claimant, from so much of said judgment as disallows the costs of her said action amounting to \$13.25, and from that part which directs the receivers to pay her claim "*pro rata* with other creditors after full satisfaction of all claims for cash money loaned to said defendant corporation."

Prior to the entry of this judgment appellant's said attachment was dissolved upon motion of the receivers. Appellant here, Kate Bories, in due time appealed from that order, and upon the hearing in this court the order dissolving the attachment was reversed. (See *Bories v. Union Building and Loan Assn.*, ante, p. 74, this day decided.)

1. Appellant's attachment being valid, and her said action authorized and unreversed, her costs were secured by the attachment, and should be paid in full from the proceeds of the sale of the attached property, her claim for costs standing, in that respect, with the judgment for \$1,807.50, allowed upon her claim upon the promissory note.

2. The remaining part of the judgment from which this appeal is taken is also erroneous. Her attachment lien was unaffected by the appointment of the receivers. The property attached came into their hands charged with the lien of the attachment, and when sold by them the proceeds are still charged with the lien, and must be applied by the receivers in payment of appellant's claim. (See *Bories v. Union Building and Loan Assn.*, ante, p. 74, this day decided, and authorities there cited.)

If the proceeds of the attached property are sufficient, her claim must be paid in full. If insufficient, the remainder thereof will stand as an unsecured claim and share in a *pro rata* distribution of the assets.

3. Nor can we see any ground for the distinction made by the court between "claims for cash money loaned" and the claim of appellant concerning which claim the court found: "That the said note was executed for and in consideration of a valid claim of said assignor [Joseph Bories, to whom the note was made] against said defendant corporation for the surrender of a certificate of shares of stock in the said corporation duly appraised and estimated to be worth the face value of the said note." We see no distinction in the character or consideration of a note given in discharge of a debt or liability against the maker for a given amount of money and a note or obligation for the same amount for "cash money" loaned. Besides, the effect of this part of the judgment would be, that creditors whose claims are for money loaned would be put in a preferred class and paid in full, and the remaining creditors would share *pro rata* in any balance that

might remain after the claims of the preferred class should be paid in full.

Counsel for respondents do not cite us any statute or authorities sustaining this part of the judgment, and barely allude to it in the briefs. It is clear that the findings do not justify or sustain the judgment as to the parts appealed from, and as to such parts the judgment should be reversed, with directions to amend the judgment by an order to the receiver to apply the proceeds of the sale of the attached property to the payment of appellant's said claim in full, if it be sufficient to do so, and if it be insufficient, that as to the deficiency she share *pro rata* with the unsecured creditors.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion it is ordered that the judgment as to the parts appealed from be reversed, and that an order be made by the court below directing the receivers to apply the proceeds of the property attached by appellant to the payment of her claim in full, if it be sufficient to do so, and if it be insufficient, that as to the deficiency she share *pro rata* with the unsecured creditors.

Shaw, J., Angellotti, J., Van Dyke, J.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[L. A. No. 1142. Department Two.—November 20, 1903.]

NELLIE SWETT, Respondent, v. JOHN A. GRAY, Appellant.

ACTION FOR SEDUCTION—SUFFICIENCY OF COMPLAINT—CHASTITY OF PLAINTIFF.—A complaint in an action for seduction, which alleges that it was induced solely by the defendant's promise of marriage, and false pretenses of great love, and his urgent importunity, to which she reluctantly yielded, and that she was then a minor, and then was and still is unmarried, and that at the time of the

grievances complained of, and at all times prior thereto, she had been chaste and virtuous, avers with sufficient definiteness that she was chaste and virtuous at the time of the actual seduction.

ID.—AVERMENT OF ABILITY AND WILLINGNESS TO MARRY NOT REQUIRED.

—Where the promise of marriage was only one of the means made use of to accomplish the minor's seduction, and other artifices and pretenses were resorted to for the same purpose, the complaint need not allege her ability or willingness to marry the defendant.

ID.—SPECIAL DEMURRER—MISJOINDER OF CAUSES—AMBIGUITY.—A special demurrer on the ground that the complaint misjoins a cause of action for seduction and for breach of a contract to marry, and for ambiguity and uncertainty as to whether the cause of action is based on the alleged seduction, or upon the alleged contract to marry, or upon the alleged suffering of the plaintiff, was properly overruled. The promise of marriage is merely set out as one of the inducements of the seduction, and the cause of action and prayer for damages is solely for the alleged seduction, and in no sense on a contract to marry, and there is no ambiguity as to the cause of action.

APPEAL from a judgment of the Superior Court of Riverside County. Lucien Shaw, Judge presiding.

The facts are stated in the opinion.

Kendrick & Knott, John G. North, Byron L. Oliver, Hartley Shaw, Valentine & Newby, and Byron Waters, for Appellant.

Gibson & Gill, for Respondent.

CHIPMAN, C.—The action is for alleged seduction, accomplished by promise of marriage and other inducements. The cause was tried to a jury, and plaintiff had the verdict. Defendant appeals from the judgment on the judgment-roll and statement of the case. There is an appeal by the plaintiff from the order granting a new trial, L. A. No. 1120, which, having been affirmed November 6, 1903, makes it unnecessary to notice the numerous alleged errors of law occurring at the trial, specified in the motion for a new trial.

Defendant interposed a demurrer to the amended complaint which was overruled, and he now insists that it should

have been sustained. Counsel for respondent have filed no brief in support of their pleading. The grounds of the demurrer are: 1. Insufficiency of facts alleged; 2. Misjoinder of a cause of action for failure to carry out a promise to marry; and 3. Ambiguity and uncertainty, in that it is not possible to ascertain from the complaint whether the cause of action is based on the alleged seduction or upon the alleged contract to marry referred to, or because of the alleged suffering of plaintiff in consequence of the illness mentioned in the complaint as attending her pregnancy.

In support of the general demurrer it is contended that it is an essential element of a cause of action of this character that the plaintiff was chaste at the time of the alleged seduction, and that without an allegation to that effect there is no cause of action stated (citing *Marshall v. Taylor*, 98 Cal. 55;¹ *People v. Krusick*, 93 Cal. 79; *People v. Wallace*, 109 Cal. 613). It is further urged that the complaint is fatally defective, because there is no averment of plaintiff's willingness to marry the defendant or the refusal of defendant to marry plaintiff. The complaint contains the following allegations: "That at the time of the commission of the grievances hereinafter mentioned, plaintiff was a minor under the age of eighteen years, and was and still is an unmarried female; and at all the times prior thereto had been chaste and virtuous." It is contended that the complaint alleges a series of grievances, and that the allegation only alleges chastity prior to this series, which it is said is not equivalent to an allegation that plaintiff was chaste at the time of the alleged seduction. The complaint alleges that about May 30, 1898, defendant, by false pretenses of his love for plaintiff, and by promises to marry her, and by urgent and persistent importunities, induced her to have sexual intercourse with him; "that she was young and was without experience in what he asked her to do, as above stated, and she greatly loved the defendant, and by reason of such love he had great influence over her, and she fully believed that he would soon marry her as he had promised to do, and that he loved her as he had so represented to her, and she alleges that she had no information, knowledge, or belief to the contrary.

¹ 85 Am. St. Rep. 144.

and that trusting and relying solely upon his said promise to marry her, and in the love and affection he professed for her, and influenced by his urgent importunity, she, with great reluctance, consented to and did then and there have sexual intercourse with the said defendant." It is then alleged: "That the said defendant on divers days and times thereafter, up to and including on or about the fifth day of September, 1899, upon the representations and pretenses hereinbefore set out, on his part, and which representations and pretenses and promise of marriage plaintiff relied upon and believed, did debauch and carnally know plaintiff; and particularly on or about the fifth day of September, 1899, upon the pretenses and representations aforesaid made and repeated to plaintiff, upon which plaintiff solely relied and believed, and while plaintiff was still a minor and under the age of eighteen years, to wit, of the age of seventeen years and nine months, did said defendant debauch and carnally know plaintiff, whereby plaintiff became sick and pregnant with child," etc. Then follow allegations of the falsity "of each and every representation made by the defendant," and that defendant knowing the same to be false, made the same to deceive plaintiff and take advantage of her love and affection for him and induce her to have sexual intercourse with him; "that in consequence of the seduction of plaintiff by the defendant as aforesaid, plaintiff has suffered greatly in her health," etc., "to her damage," etc. It is clear from the complaint that the alleged seduction occurred in May, 1898, and while it may be true that on the face of the complaint it appears that plaintiff could not have been chaste when she subsequently yielded to defendant's importunities, still there is an allegation "that at the time of the commission of the grievances hereinafter mentioned, plaintiff . . . was . . . and at all the times prior thereto had been chaste and virtuous," and this certainly included the time of the actual seduction, and we think was sufficiently definite.

There is no allegation of plaintiff's ability and willingness to marry defendant. It is conceded by appellant that in a criminal prosecution for seduction a promise to marry made in good faith which was not fulfilled is no defense (*People*

v. *Samonset*, 97 Cal. 448), and it is also conceded that in a criminal prosecution seduction is not excused by the willingness of the seducer to marry his victim and her unwillingness to such union, but it is urged that in a civil action for seduction the same reasoning does not apply. It is urged that because in an action for breach of promise to marry an allegation of willingness on the part of plaintiff to marry the defendant is essential (*Hook v. George*, 108 Mass. 324; *Graham v. Martin*, 64 Ind. 567), so must it be in an action for seduction. Appellant cites no authority in support of this contention, and we do not think it can be the law. There might possibly exist some reason in the position where the promise of marriage was the sole inducement, and the plaintiff was of age, although even in that case we should doubt it, but where other artifices are resorted to, and promise of marriage is but one of the means used by defendant to accomplish his purpose, it would certainly not be so. As well might it be said that defendant in fact cherished genuine love and affection for his victim when he so represented his feeling to her, and hence that would excuse him, and so of any other of the inducements which brought about her ruin. In a seduction case it may sometimes happen that the victim of the seducer's passions may awake to a realization of his unworthiness upon finding herself pregnant, and that her former love, which he had played upon, would suddenly turn to hate. Must she still avow willingness to marry the author of her disgrace and ruin, or be foreclosed the scant recompense the law affords by civil action? We think not. She may be a minor, as in this case, and incapable of contracting marriage. Society may be interested in the criminal aspect of a seducer's conduct, and hence the reason as appellant suggests for the rule in criminal cases. But so also is society interested in protecting an innocent woman from forced marriage with her betrayer. As in a criminal case for seduction, so in a civil action, the law will not impose terms so repugnant to good morals and so obviously unjust to the innocent victim.

There is no merit in the claim that there is a misjoinder of actions. The promise of marriage is set out as one of the inducements for the seduction, and not otherwise, and the

prayer for damages is solely for the alleged seduction. Nor do we think there is any ambiguity in this regard. Clearly the action is based solely upon the alleged seduction, and in no sense on a contract to marry. We think the demurrer was rightly overruled. The judgment, so far as this appeal is concerned, should be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed, but this affirmance does not affect the order granting a new trial, which has been affirmed, and which vacates the judgment.

McFarland, J., Lorigan, J., Henshaw, J.

[Crim. No. 1025. Department One.—November 21, 1903.]

THE PEOPLE, Respondent, v. CHARLES L. COLE, Appellant.

CRIMINAL LAW—GRAND LARCENY—THEFT OF CARPETS—EVIDENCE—FALSEHOOD OF DEFENDANT—CONSCIOUSNESS OF GUILT.—Upon a prosecution for grand larceny, in stealing carpets belonging to a furniture company, where it is proved that defendant, while acting as shipping clerk for the company, delivered the carpets to one B. at the back door of the store, at six o'clock in the morning, evidence is admissible to show that soon after the company discovered the loss of the carpets the defendant, when confronted with B., who recited the facts, denied the delivery of the carpets to B., and declared that he did not know B. Deception, falsehood, and fabrication as to the facts of the case are admissible on the same theory as flight and concealment of the person charged with crime, as tending to show consciousness of guilt and criminal intent.

1D.—GENERAL OBJECTION TO QUESTION—REASONS FOR ARREST—MATTER OF HEARSAY AND ARGUMENT—WAIVER OF SPECIFIC OBJECTION—APPEAL.—A general objection to a question asked from a representative of the furniture company as to his reasons for arresting the defendant, on the ground that it was irrelevant, incompetent, and hearsay, was properly overruled, as it could not be anticipated that the answer would contain objectionable matter, and where matter of knowledge was stated and also matter of hearsay, and argumenta-

tive statements mingled with declarations as to his suspicions, which were given without further specific objection, or any motion made to strike out the objectionable matter, objection thereto is waived, and cannot be urged upon appeal for the first time.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. F. H. Dunne, Judge.

The facts are stated in the opinion.

J. J. Guilfoyle, Jr., and Robert Ferral, for Appellant.

U. S. Webb, Attorney-General, and Lewis F. Byington, District-Attorney, for Respondent.

GRAY, C.—Defendant was convicted of grand larceny, and appeals from the judgment and order denying him a new trial.

1. The defendant was in the employ of the Indianapolis Furniture Company's store, in the city of San Francisco, in the capacity of assistant shipping clerk, and occasionally made sales for his employer. The evidence introduced by the prosecution tended to show that on the morning of March 19, 1901, at about half-past six o'clock, the defendant at the back door of said store delivered to one Burke ten rolls of carpet belonging to the Indianapolis Furniture Company, of the value of about three hundred and fifty dollars. In addition to this evidence, the prosecution, against the objection of defendant, was permitted to show that soon after the discovery of the loss of the property the defendant, on being confronted with Burke, and in response to a recital to him by said Burke of the facts showing the removal and delivery of the carpets to said Burke, denied the fact of delivery, and declared that he did not know Burke. This denial of defendant we think was competent and proper evidence to go to the jury for what it was worth. If the jury believed that defendant delivered the property, as disclosed by the testimony of some three witnesses, then the fact that defendant denied the delivery was a circumstance tending to show that the delivery was not made innocently in his capacity as a salesman, but with intent to steal the property. If he had delivered the property innocently, the most natural thing for him

to have done was to tell the truth about it. If he intended to steal it, the most natural thing for him to do when questioned about it was to lie concerning it. Deception, falsehood, and fabrication as to the facts of the case are treated as tending to show consciousness of guilt, and are admissible on the same theory as flight and concealment of the person when charged with crime. In *People v. Arnold*, 43 Mich. 303,¹ Judge Cooley, speaking for the court, says: "It was never doubted that the conduct of a suspected party when charged with a crime may be put in evidence against him when it is such as an innocent man would not be likely to resort to. Thus, it may be shown that he made false statements for the purpose of misleading or warding off suspicion; though these are by no means conclusive of guilt, they may strengthen the inference arising from other facts, . . . so it may be shown that the accused fled to escape arrest, or broke jail or attempted to do so, or offered a bribe for his liberty to his keeper. These are familiar cases, and rest in sound reason. But the case of deliberate fabrication of evidence or of attempt in that direction would seem to be still plainer." (*People v. Philbon*, 138 Cal. 530.)

There is nothing in *People v. Teshara*, 134 Cal. 542, out of harmony with this rule of evidence. In that case this rule is not discussed or even referred to, and the case is entirely dissimilar to the one before us. That was a murder case in which, under the circumstances developed therein, if the killing by defendant could be shown, his guilt would be presumptively established, and the burden would then be upon him to show circumstances in mitigation or excuse. But in this case to show that defendant took the goods and caused them to be carried away raised no presumption of his guilt, because of the further fact that it was within the lines of his employment to do that very thing, and the burden was cast upon the prosecution to show by evidence that the carpets were removed not in the course of his employment, but with intent to steal, and for him to deny that he moved the goods when in fact he did move them would tend to show that criminal intent necessary to establish guilt.

2. On cross-examination of Hamilton Page he was asked if he did not have defendant arrested "because of information

¹ 38 Am. Rep. 182.

that Ryan gave," to which he replied, "Well, principally," and further stated that he knew nothing of his own knowledge against defendant. He was then asked by the prosecution: "Just state why you had him arrested." This was objected to by defendant as irrelevant, incompetent, and hearsay. The objection was overruled and exception taken. The witness then began his answer with, "My carpet-man came to me and told me there was something wrong in the carpet department." This was followed with a statement of how he reached the conclusion that somebody in his employ who had as much intelligence as he had about the stock had been systematically stealing carpets from the house; that at first he didn't know whom to suspect, but that he subsequently learned that Cole had a key to the house, and that he then suspected that Cole, having the key and the intelligence, was the man who stole the carpets. The witness went on to relate other facts that had come to his knowledge, all pointing the finger of suspicion at Cole. In the answer of the witness to the question objected to, he stated facts which were clearly hearsay, tending to justify the suspicion declared as well as the arrest of the defendant. At the time the court ruled on the question, however, it could not have been anticipated that the witness would state matters of hearsay, or would make an argumentative statement intermingled with declarations as to his suspicions. Also, it must have taken considerable time for the witness to have thus delivered himself. It does not appear, however, that defendant's attorney interrupted him with any new objections or motion to strike out any portion of his statement. Nor was any such motion made at the conclusion of the answer. The question was asked, no doubt, to bring out a full reply to the question just previously asked by the defendant's attorney as to the reason why the witness had the defendant arrested. He might with propriety have answered that he caused the defendant to be arrested because the latter had denied in the presence of the former all knowledge of Burke; and this, no doubt, was the answer the attorney for the prosecution expected to elicit by the question. This must be so, because the previous testimony of the witness given on direct examination was to the effect that immediately upon this denial of defendant he (witness) had said to Ryan "There is nothing to do but to take hold of the prisoner."

The attorney asking the question objected to must have had in mind this previous testimony of the witness and desired to call attention to it as the real reason, or at least as an additional reason, influencing the witness in ordering the arrest. There was nothing improper in this attempt to thus call to the attention of the jury, as an additional valid reason for the arrest, a matter which did not involve any hearsay statement. And if nothing but the answer thus apparently sought had been elicited, we think no complaint would here be made. On a proper motion all the hearsay and argumentative matter might have been eliminated from the answer now complained of; and we doubt not that it would have been so eliminated had the necessary motion been made. If the defendant did not desire to have the answer stand as it was given he should have made some such motion, and thereby particularly invoked the ruling of the court as to the objectionable matters. (*O'Calligan v. Bode*, 84 Cal. 489.) He will not be permitted to remain silent in the court below and object here for the first time. As the record stands, there is really no ruling of the court that can be called erroneous.

We advise that the judgment and order be affirmed.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Angellotti, J., Shaw, J., Van Dyke, J.

Hearing in Bank denied.

[SAC. No. 993. Department One.—November 21, 1903.]

E. CLARK, Respondent, v. WILLIAM BROWN et al., Defendants; BEST MANUFACTURING COMPANY, Appellant.

LIEN FOR WAGES—LABORERS ON THRESHING MACHINE—CONTRACT WITH LESSEE—LIEN FOR VALUE.—Where the defendant who made the contract with laborers upon a threshing-machine was a lessee for the defendant appealing, who owned the machine, an objection that the appellant was not liable to a lien for the contract price, but only for the value of the work, is untenable, where the value of the work is alleged and found, and a lien is only given for the value found by the court.

ID.—CONTRACT FOR SERVICES AND HORSES—SEGREGATION OF SERVICES.—The fact that a laborer made an entire contract with the lessee for personal services and horses at the rate of four dollars per day does not preclude lien upon the threshing-machine for the value of the personal services rendered, though no lien could be or was allowed for the work done by the horses.

ID.—ASSIGNABILITY OF LIEN.—The lien acquired by a laborer on a threshing-machine under the act of March 12, 1885, (Stats. 1885, p. 109,) is assignable.

ID.—FORECLOSURE OF LIEN—COSTS AGAINST OWNER DEFENDING—AMOUNT OF JUDGMENT.—The foreclosure in the superior court of the liens of laborers upon a threshing-machine is an action in equity, and costs were properly allowed therein against the owner of the machine, who was a necessary party defendant, and who appeared and made affirmative defenses against the claims of the plaintiff, notwithstanding the amount of the judgment rendered was less than three hundred dollars.

ID.—CONCURRENT JURISDICTION.—In actions of this character, where the claim is for less than three hundred dollars, the superior court has concurrent jurisdiction with that of justices of the peace, and the plaintiff is entitled to costs, whether he seeks relief in one jurisdiction or the other.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. Edward I. Jones, Judge.

The facts are stated in the opinion of the court.

J. B. Webster, for Appellant.

Charles De Legh, for Respondent.

SHAW, J.—This is an action to foreclose an alleged lien upon a threshing-machine, brought under the act of March 12, 1885, providing a lien for the wages of persons employed as laborers on threshing-machines. (Stats. 1885, 109.) The complaint contains three counts, the first to recover for labor performed by the plaintiff, the other two upon claims assigned to the plaintiff by others who performed work in connection with the machine. The appeal is taken by the Best Manufacturing Company from the judgment and from an order denying its motion for a new trial.

1. The threshing-machine in question was in the use and possession of William Brown at the time the work was done for which the liens are claimed, and in each case the work was done under a contract by the respective laborers with William Brown, to which contract the defendant Best Manufacturing Company was not a party. The appellant claims to be the owner of the machine, and it appears from the evidence, although it is not expressly alleged either in the complaint or answer, that it is the owner of the machine, and that Brown was operating the same under a lease from the appellant. The first point urged is, that the appellant is not liable for a lien beyond the value of the work, and that the contract price is not conclusive on the question of value. The allegation in the case of the work by the plaintiff Clark is, that it was of the value of \$122.77, upon which \$41 had been paid, leaving due \$81.77; as to the work of assignor Hawes, that the work was of the value of \$96.25, of which \$49.50 had been paid, leaving a balance of \$46.75, and as to the work of McHenry, that it was of the value of \$139.20, of which \$60 had been paid, leaving \$79.20 due. The court finds, upon sufficient evidence, that the work done by the respective parties for which they were entitled to liens was of the value of \$108.25, for which sum judgment was given. Conceding, therefore, that the owner under the circumstances is liable only for the value of the work, there is no error, for the judgment is for the value as found by the court.

2. Another point made is, that a part of the claims included in the complaint were for the services of horses belonging to the plaintiff, for which the statute gives no lien. It must be conceded, of course, that no lien existed on the threshing-machine for the value of work done by horses upon

the machine while engaged in threshing. No error in this respect, however, was committed by the court below, for the reason that the value of the work done by the horses was eliminated from the judgment, which included only the amount due for the labor of the men. It appears that the work done by the plaintiff was under an entire contract for the services of himself and his horses, at the rate of four dollars per day. The court, however, found that the services of the plaintiff alone were worth two and one-half dollars per day, and gave judgment accordingly. The appellant contends that as the work was done under an entire contract, it cannot be segregated, and that by making his contract include the services of himself and his horses, he waived any right to a lien. The statute, however, provides that every person performing work upon any threshing-machine while engaged in threshing shall have a lien upon the same to the extent of the value of his services. We can see no reason why the fact that a party makes an entire contract for the services of himself and his horses should deprive him of the right to lien for his own services where, as in this case, the amount thereof can be ascertained and distinguished from the amount due for the services of the horses, and we are therefore of the opinion that this point is not well taken. The same point arises with reference to the services of McHenry, one of the assignors of the plaintiff, and what we have said applies with equal force to that part of the case.

3. The lien which a laborer acquires under this statute is assignable, and therefore the plaintiff by the assignment acquired the rights of McHenry and Hawes to the lien which they possessed by reason of their labor upon the machine. This was so decided in *Duncan v. Hawn*, 104 Cal. 10.

4. There was no error in giving judgment for costs against the defendant the Best Manufacturing Company. The plaintiff was the owner of the lien upon the property belonging to the defendant, and this is an action to foreclose the lien. It is an action in equity, and under sections 1022 and 1025 of the Code of Civil Procedure costs were properly given against necessary parties to the action, who appeared and made affirmative defenses against the claims of the plaintiff, notwithstanding the fact that the judgment was for less than three hundred dollars. In actions of this character, where

the claim is for less than three hundred dollars, the superior court has concurrent jurisdiction with that of justices of the peace, and the plaintiff is entitled to costs, whether he seeks relief in one jurisdiction or the other.

The judgment and order are affirmed.

Angellotti, J., and Van Dyke, J., concurred.

[S. F. No. 3113. In Bank.—November 23, 1903.]

PATRICK J. JONES, Respondent, v. BOARD OF POLICE COMMISSIONERS OF CITY AND COUNTY OF SAN FRANCISCO et al., Appellants.

MANDAMUS—REINSTATEMENT OF POLICEMAN—STATUTE OF LIMITATIONS—DEMURRER.—An application for a writ of *mandamus* is a special proceeding of a civil nature, which is subject to the rules which govern the limitation of actions. An application, therefore, to reinstate a policeman, which shows on its face that more than seven years had elapsed after his dismissal before the petition was filed, is demurrable on the ground that it was barred by the statute of limitations, whether it be deemed barred by subdivision 1 of section 338 of the Code of Civil Procedure, or by section 343 of that code.

Id.—LACHES.—The proceeding is also barred by laches. Courts will not allow parties to sleep upon their rights for so many years and then invoke the aid of this prerogative writ.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion.

Franklin K. Lane, City Attorney, for Appellants.

William T. Baggett, and Arthur H. Barendt, for Respondent.

COOPER, C.—This is a proceeding in *mandamus* for the purposes of compelling the board of police commissioners of

the city and county of San Francisco to admit petitioner to the office of policeman in the police department of said city. The petition was filed October 4, 1901, and alleges "That on the sixteenth day of April, A. D. 1894, the board of police commissioners of the city and county of San Francisco did unlawfully preclude this plaintiff from the use and enjoyment of his said office as such policeman, and did pretend to dismiss him therefrom, and did prevent him from performing any of the duties of his said office. That ever since said sixteenth day of April, 1894, plaintiff and petitioner, by the said unlawful acts of said board of police commissioners, has been and now is precluded from the use and enjoyment of his said office."

Defendant demurred to the complaint upon the ground, among others, "that plaintiff's cause of action and right to a writ of mandate is barred by subdivision 1 of section 338 of the Code of Civil Procedure, and by section 343 of the Code of Civil Procedure." The demurrer was overruled, and defendant failed to answer. Thereupon judgment was entered for petitioner as prayed. This appeal is from the judgment. The demurrer should have been sustained upon the ground that the right to the writ, if it ever existed, is barred by the statute. It was more than seven years after petitioner was dismissed and discharged before he filed his petition. It becomes immaterial to determine which particular provision of the code bars this proceeding, because it is barred by either provision. The period that elapsed after petitioner's alleged rights accrued is longer than the time given for the commencing of an action by an individual under any provision of the code. Not only this, but it is barred by laches. Courts will not allow parties to sleep upon their rights for so many years and then invoke the aid of this prerogative writ. It has been said in some cases that the statute of limitations is not applicable, strictly speaking, to a petition for a writ of mandate, but we think it is applicable under our Code of Civil Procedure. The provisions in regard to granting the writ of mandate are under part III of title I. Section 1109 under the same title, provides, "the provisions of part II of this code are applicable to, and constitute the rules of practice in the proceedings mentioned in this title." Part II of the Code of Civil Procedure con-

tains the provisions and sections upon the subject of limitation of actions, and is therefore applicable. Not only this, but the closing section in the title in regard to time of commencing action provides, "the word 'action,' as used in this title, is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature." (Sec. 363.) The application for a writ of mandate is a special proceeding of a civil nature. (Code Civ. Proc., sec. 23; also, part III, secs. 1063 et seq.; *People v. Board of Supervisors*, 27 Cal. 655.) In *Barnes v. Glide*, 117 Cal. 1,¹ it was held that an application for a writ of mandate to compel the trustees of a swamp-land district to levy a tax to pay certain warrants was barred by the statute of limitations. It was there said: "Therefore, it is quite clear that not only under the general authorities, but under the provisions of our code, a proceeding like the one at bar in *mandamus* is subject to the rules which govern the limitations of actions." The rule as laid down in the above case is the rule in other jurisdictions (*People v. Supervisors of Westchester*, 12 Barb. 446; *People v. French*, 12 Abb. N. C. 156; *Georges Creek Coal etc. Co. v. County Commrs.*, 59 Md. 262; *People v. Chapin*, 104 N. Y. 96), and so stated in the text-books. (Moses on *Mandamus*, p. 190; Merrill on *Mandamus*, sec. 314.)

It follows that the judgment should be reversed, with directions to the court below to sustain the demurrer and dismiss the proceeding.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed, with directions to the court below to sustain the demurrer and dismiss the proceeding.

McFarland, J., Van Dyke, J., Shaw, J.,
Angellotti, J., Lorigan, J., Beatty, C. J.

¹ 59 Am. St. Rep. 153.

[S. F. No. 3470. Department One.—November 24, 1903.]

UNION COLLECTION COMPANY, Respondent, v. A. C.
SOULE, Appellant.

ACTION ON NOTE—STATUTE OF LIMITATIONS—PENDENCY OF INSOLVENCY PROCEEDINGS—DISMISSAL—STATUTORY PROHIBITION.—The pendency of insolvency proceedings instituted by the maker of a note, though subsequently dismissed, operated, under section 62 of the Insolvency Act, and section 356 of the Code of Civil Procedure, as a statutory prohibition to an action upon the note, and the period of such pendency and prohibition is not part of the time limited for the commencement of the action.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank J. Murasky, Judge.

The facts are stated in the opinion.

Robert Ash, for Appellant.

J. S. Reid, for Respondent.

GRAY, C.—This is an action on a promissory note. The plaintiff obtained judgment, and the defendant Soule appeals from the same. The appeal from an order denying a new trial has been dismissed.

The appellant's sole contention is, that the record shows without conflict that the note sued on was barred by the four-year statute of limitations at the time the suit was commenced. The undisputed facts in that behalf, as they appear from the pleadings and findings, are as follows: The note sued on is dated March 16, 1893, and matured six months thereafter. On the eleventh day of November, 1895, the appellant filed a petition, schedules, and inventory in insolvency, in conformity to the Insolvency Law of the state adopted in 1895, and was thereupon duly adjudged an insolvent, and the usual order was entered as provided in said act staying all proceedings against him. Soule failed to apply to the court for a discharge from his debts, and thereafter, on March 16, 1900, on motion of certain of Soule's creditors, the said insolvency proceeding was duly and regularly dismissed. This action was commenced on January 15, 1902, considerably less

than four years after the note fell due, if we exclude the time during which the insolvency proceeding was pending, but considerably more than four years thereafter, if we include that period. Section 62 of the Insolvent Act of 1895 (Stats. 1895, p. 152) provides: "Pending proceedings by or against any person, copartnership, or corporation, no statute of limitations of this state shall run against a claim which in its nature is provable against the estate of the debtor." Section 356 of the Code of Civil Procedure provides: "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action."

The fact that the Insolvency Act authorizes the maintenance of suits against insolvents for certain purposes, and by leave of court first had, does not affect the rule laid down in the above statutes. "The theory of our statute of limitations is, that a creditor has four years (or other time, as the case may be) on any day of which he may, of his own volition, commence an action." (*Hoff v. Funkenstein*, 54 Cal. 233.) It is in accordance with the settled law of the state that the statute of limitations did not run during the period covered by the pendency of the insolvency proceedings. Excluding this period, it was less than four years after the note fell due that the suit was commenced, and the cause of action was not barred.

We advise that the judgment be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Van Dyke, J., Angellotti, J., Shaw, J.

Hearing in Bank denied.

[S. F. No. 3245. Department One.—November 24, 1903.]

JOHN McCLOSKEY and ANN McCLOSKEY, Appellants,
v. MARTIN TIERNEY, Executor, etc., Respondent.

ASSIGNMENT OF BANK ACCOUNT—DELIVERY OF BOOK—WILL.—An instrument executed by a person about to die, a few days before his death, stating that "for services rendered, I, the undersigned, leave to Mrs. McCloskey, the balance of my account with the German Savings and Loan Society," specifying the amount, together with the concurrent delivery to her of the bank-book showing the account referred to, evidences a present assignment of the bank account, and not a disposition of a testamentary nature, to take effect only at the death of the signer of the instrument.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Frank H. Kerrigan, Judge.

The facts are stated in the opinion.

Finlay Cook, for Appellants.

The circumstances under which the instrument was executed are to be considered, and the intention to transfer the bank account must govern. (Code Civ. Proc., secs. 1856, 1860; Civ. Code, secs. 1625, 1639, 1640, 1643, 1647, 1649, 1654; 1 Greenleaf on Evidence, secs. 282 et seq., 297 et seq.; 2 Ency. of Law, 2d ed., 287 et seq.; *Balfour v. Fresno etc. Co.*, 109 Cal. 221; *Balfour v. Fresno etc. Co.*, 123 Cal. 395; *Clarke v. Ransom*, 50 Cal. 595; *Ross v. Brusie*, 64 Cal. 245; *Jenny Lind Co. v. Bower*, 11 Cal. 198; *Altschul v. San Francisco etc. Assn.*, 43 Cal. 171; *Truett v. Adams*, 66 Cal. 218; *Board of Education v. Keenan*, 55 Cal. 642; *Piper v. True*, 36 Cal. 606; *Saunders v. Clark*, 29 Cal. 304; *Salmon v. Wilson*, 41 Cal. 595.)

Sullivan & Sullivan, and R. F. Mogan, for Respondent.

The word "leave" is testamentary. (*Doe v. Thorley*, 10 East, 438; *McKonkey's Appeal*, 13 Pa. St. 253; *Mitchell v. Donohue*, 100 Cal. 202.¹)

¹ 128 Am. St. Rep. 297.

SMITH, C.—This suit was brought against the German Savings and Loan Society to recover a balance of \$738.85, alleged to be due to the defendant's testator, and to have been by him assigned to the plaintiff Ann McCloskey. The money was paid into court by the bank, and upon its application, under section 386 of the Code of Civil Procedure, the present defendant was substituted for it.

The main question in the case turns upon the construction of the written instrument offered by the plaintiff in proof of the alleged assignment, and excluded by the court, which is as follows:—

“SAN FRANCISCO, February 4th, 1901.

“For services rendered, I, the undersigned, leave to Mrs. McCloskey the balance of my account with the German Savings and Loan Society, which amounts to date \$789.85 (seven hundred and eighty-nine dollars and eighty-five cents).

“NICHOLAS MURPHY.”

This instrument was duly executed by Murphy a few days before his death, and, with the bank-book showing the account referred to, delivered by him to the plaintiff Mrs. McCloskey. It was excluded from evidence by the court on the ground that it was not a present assignment of the claim, but a disposition of it to take effect on the death of Murphy, and therefore of a testamentary nature. But we do not think this view of the case can be sustained. The language of the instrument imports a present disposition of the property for valuable consideration, and this construction is confirmed by the concurrent delivery of the bank-book showing the account. The words used (“I . . . leave to Mrs. McCloskey,” etc.) are not indeed the aptest to express the idea of an assignment; but in view of the impending death of the assignor, and the resulting sense of immediate or speedy departure under which he must have acted, they were not altogether inappropriate, and we do not think that the intention to assign can be doubted. The instrument must therefore be construed as a present assignment of the claim. (Civ. Code, secs. 1636, 1637, 1643, 1654, 3541, and note to last section in Pomeroy's Edition. See Broom's Legal Maxims, 521, 657; *Sprague v. Edwards*, 48 Cal. 240.)

It follows that the judgment and order appealed from should be reversed, and we so advise.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

Van Dyke, J., Angellotti, J., Shaw, J.

[L. A. No. 1107. Department One.—November 25, 1903.]

NEWPORT WHARF AND LUMBER COMPANY, Appellant, v. H. L. DREW et al., Respondents.

STATE HOSPITAL—BUILDING OF WARD—NOTICE OF MATERIALMEN—LIABILITY OF TRUSTEES—INTERESTS AND COSTS.—The trustees of a state hospital, whose treasurer lawfully holds the custody of moneys due to a contractor for the building of a ward, do not, by joining in the answer of a bank which claimed title to the money by assignment from the contractor, become liable to interest and costs at the suit of materialmen, who by notice of their claims to a particular estimate were entitled thereto as against the bank, where no claim for interest was made in the complaint, and the trustees were enjoined from making payment to the bank, and they did not make any adverse claim to the money in litigation, but were willing to obey any order of the court in the action in relation thereto.

ID.—PAYMENT INTO COURT—DUTY OF PUBLIC TREASURER.—A public treasurer is not obliged, in case of conflicting claims to money in his hands, to pay it into court in order to avoid interest and costs. His office makes him trustee to hold the money until he can pay it out under lawful authority.

ID.—LIABILITY OF PUBLIC TRUSTEES—DISCRETION—GOOD FAITH.—The trustees of the state hospital are public officers, who are guardians of the public money belonging thereto. They have certain discretionary powers, and should not be made answerable for injury or errors of judgment when acting in good faith, within the scope of their authority, without malice, corruption, or sinister motives.

APPEAL from an order of the Superior Court of San Bernardino County granting a new trial. H. L. Campbell, Judge.

The facts are stated in the opinion and in 125 Cal. 585, therein cited.

John S. Chapman, and James G. Scarborough, for Appellant.

The trustees were liable for interest and costs because they did not pay the money into court and contested plaintiff's claim. (Code Civ. Proc., sec. 386; Civ. Code, secs. 1917, 3287; 3 Pomeroy's Equity Jurisprudence, secs. 1320, 1325; 16 Am. & Eng. Ency. of Law, 2d ed., 1012; 11 Am. & Eng. Ency. of Law, 2d ed., 477; *Pfister v. Wade*, 69 Cal. 133; *De Camp L. Co. v. Tolhurst*, 99 Cal. 631; *Brown v. Campbell*, 110 Cal. 644; *Converse v. Ware Sav. Bank*, 152 Mass. 407; *Bevier v. Shoomaker*, 29 How. Pr. 411; *Spring v. S. C. Ins. Co.*, 8 Wheat. 270-293; *Powers v. May*, 123 Cal. 147.)

Otis & Gregg, for Respondents.

Money held in a public treasury is held for the benefit of the party adjudged entitled thereto, and need not be paid into court, and the treasurer cannot be charged with interest until he has failed to pay it out as directed. (*United States v. Curtis*, 100 U. S. 119.) A trustee is not chargeable with more than he has received of the trust estate, unless there is gross negligence or willful default. (*Osgood v. Franklin*, 2 Johns. Ch. 1;¹ *Wheeler v. Bolton*, 92 Cal. 159.) Costs are not usually allowed against a public officer. (5 Am. & Eng. Ency. of Plead. & Prac., pp. 152, 153.)

COOPER, C.—This case has been here before, and the facts are there fully stated, 125 Cal. 585. It is a contest between plaintiff, arising by reason of material furnished and used in building a ward to the Southern California State Hospital, as to certain amounts that became due the contractor under the contract, and the Farmers' Exchange Bank, one of the defendants, to whom the contractors had assigned the installments in contest.

The other defendants are members of the board of trustees of the asylum. The case originally involved the amount that became due to the contractors under the eighth estimate,

\$2,814.75; the ninth estimate, \$584.77; and the tenth estimate, \$2,579.33.

It was held on the former appeal that the plaintiff, by virtue of a notice given to the trustees before payment became due, was entitled to the amount of the tenth estimate, but that the defendant bank had acquired title to the amount due under the eighth and ninth estimates, by virtue of prior assignment by the contractors. This became the law of the case, and is not here called in question. After the former appeal upon the case being remanded to the lower court, a new trial was had. Upon such trial the sole contest was as to whether or not plaintiff was entitled to interest upon the amount of the tenth estimate, from May 20, 1895, the day it gave notice to the trustees, to December 11, 1899, the day the trustees paid the money to the clerk of the court to abide the final result of the suit, the amount of such interest being, \$822.50. The court below found that the defendants, trustees, "have joined with, aided, and assisted the defendant bank in resisting and contesting plaintiff's claim in every stage of this case, and that they have never occupied the position of disinterested stakeholders until December 11, 1899," when they deposited with the clerk of the court the amount of the tenth estimate. The court, upon said finding, concluded that the plaintiff was entitled to a judgment against the trustees for the amount of said interest and for costs, and judgment was accordingly entered. Defendants made a motion for a new trial upon a statement of the case, and the court below was convinced that it was in error in giving judgment for such interest and costs, and made an order granting defendants, trustees, a new trial. This appeal is from the order so made, and the only question is as to the interest and costs for which judgment was given against said trustees.

We think the trustees were not liable for interest or costs, and that the court properly granted a new trial. The trustees are in charge of public moneys to be expended for lawful purposes, and as provided by statute for the care of the insane and inebriate wards of the state. In the course of their duties they let the contract for building the ward to the asylum in pursuance of the appropriation made by the legislature therefor. They were met by notices and conflicting claims as to the eighth, ninth, and tenth estimates that had become due under the contract. The attorney for plaintiff

appeared before the trustees and desired them to take some action as to the payment of the conflicting claims, so that the matter might be determined in court. The trustees referred the matter to their attorney, who advised them that the bank was entitled to all the moneys due under these estimates. They accordingly made an order that the money be paid to the bank.

Plaintiff immediately filed its complaint, in which it prayed that the trustees be enjoined and restrained from paying the money to any one until the rights of the plaintiff and of the bank to the money should be determined, and that it be adjudged that plaintiff is entitled to the same, and that the said trustees and their treasurer be directed to pay the same to plaintiff.

No claim as to interest was made in the complaint as so filed. The court thereupon, on plaintiff's request at the commencement of the case, granted an injunction directed to the trustees, commanding them, and each of them, to "refrain and desist from paying to any one any of the moneys due and unpaid from the said trustees upon their contract." This injunction was in force during all the time for which interest is claimed.

The defendants, trustees, joined with the defendant bank in the answer to the complaint,—that is, the answer was made by defendant as a joint answer signed by "Attorneys for defendants." But in this answer nothing was claimed by the trustees in addition to the rights claimed by the bank under the assignments. The trustees did not claim the money, nor any adverse interest in it. It does not appear that they aided or assisted the bank in any other way than by joining in said answer.

After the action was commenced, and before the second trial, the term of the trustees who were such at the first trial had expired, and the present trustees had been appointed, and had qualified and assumed office. The present trustees, in December, 1899, filed an amended and supplemental answer, setting forth the fact that the term of the trustees who were such when the action was commenced had expired, and the fact of their own appointment. In this supplemental answer the trustees alleged that they did not claim, and never had claimed, any interest in the moneys in contest, and further alleged that they "are now and at all times have

been ready and willing to obey any order of the court in the premises," and to pay the moneys to whichever of the parties the court should adjudge to be entitled thereto. At the second trial it was conceded by plaintiff's attorney in open court that the trustees in the matter of ordering the moneys paid to the bank were "acting as a board and deciding between two claimants to this money, without any feeling of bias or prejudice in favor or against one side or the other." The attorney further stated: "I will say that I do not intend to impugn their good faith; I don't intend to impugn the good faith of the trustees."

It is said in appellant's brief: "If they [the trustees] had deposited the money in court and disclaimed any interest in the money, or had merely disclaimed and expressed their willingness to pay the money over to whomsoever the court found was entitled to it, they would not have been liable for interest or costs." That is precisely what the present trustees did. The trustees who were such at the time of the first trial did not in express words disclaim any interest in the moneys, but they did not claim any interest therein. They joined with the bank in the answer, but the only question raised related to the title to the moneys as between the plaintiff and the bank. The bank could have raised all such questions without the necessity of the trustees joining in the answer. It would have been proper and better practice for the trustees in the first place to have disclaimed, and to have filed a separate answer; but as they did not do so, we do not think that for this reason alone they subjected themselves to interest and costs. It may have been, and probably was, the fault of their attorneys that such course was not taken. The moneys were kept in their possession by the express order of the court. If it had been paid into court, the plaintiff would not have been entitled to the possession of it any sooner, nor would it have been entitled to interest. The money was in the hands of the treasurer of the asylum. A public treasurer is not obliged, in case of conflicting claims to money in his hands, to pay it into court to avoid costs and interest. His office makes him trustee to hold the money until he can pay it out under lawful authority.

The principle controlling this case is stated by the supreme court of the United States in *United States v. Denver*, 106 U. S. 536, where it was held that interest could not be re-

covered against the assistant paymaster of the United States. It is there said: "That principle is that where an officer of the government has money committed to his charge, with the duty of disbursing or paying it out, as occasion may arise, he cannot be charged with interest on such money until it is shown that he has failed to pay when such occasion required him to do so, or has failed to account when required by the government, or to pay over or transfer the money on some lawful order. The mere proof that the money was received by him raises no obligation to pay interest in the absence of some evidence of conversion or some refusal to respond to a lawful requirement." In this case there is no claim of a conversion. There is no claim of prejudice or hostile action by the trustees. It seems they were right as to the title to the moneys due under the eighth and ninth estimates. This court decided in favor of the plaintiff as to the tenth estimate. That decision they are ready and willing to obey. Public officers occupying the position of trustees are the guardians of the public money. They have certain discretionary powers, and should not be made answerable for any injury when acting in good faith within the scope of their authority and not influenced by malice, corruption, or sinister motives. They should not be punished for errors of judgment when their motives are pure and untainted with fraud or malice or willful wrong.

It follows that the order should be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed.

Angellotti, J., Shaw, J., Van Dyke, J.

[S. F. No. 3385. Department One.—November 27, 1903.]

H. H. JAMISON, Appellant, v. CATHARINE HYDE, Respondent.

BROKER'S SALE OF REAL ESTATE—COMMISSIONS—ADMINISTRATION SALE—STATUTE OF FRAUDS—AMENDMENT OF ANSWER—CHANGE OF ADMISSION TO DENIAL.—An answer to an action by a real estate agent to recover commissions for the sale of real estate, which admitted the contract, and pleaded that it was made by her as administratrix of the estate of a deceased person, and not otherwise, and which also alleged for a separate defense that the contract was oral, and was void under the statute of frauds, specially pleaded, does not admit the validity of the contract; and it was not an abuse of discretion to allow an amendment at the trial of the first part of the answer so as to deny the existence of the contract, and thus remove a possible ambiguity in the answer.

ID.—ADMISSIBILITY OF CONTRACT—PLEA OF STATUTE OF FRAUDS.—The answer admitting the contract alleged did not waive the protection of the statute of frauds, where the contract was expressly alleged to have been oral, and the statute of frauds was specially pleaded. In such case the rights of the defendant stood as if no admission had been made or amendment allowed.

ID.—BURDEN OF PROOF—NONSUIT.—The burden of proof under the original answer was upon the plaintiff to prove a contract in writing, and where no such proof was made, and after amendment of the answer the plaintiff was allowed an opportunity to introduce further proof, but produced none, a nonsuit was properly granted.

ID.—REASONABLE VALUE OF SERVICES NOT RECOVERABLE.—Where there was no contract in writing for the employment of the plaintiff to sell the real estate, plaintiff was not entitled to recover the reasonable value of his services in selling it.

APPEAL from a judgment of the Superior Court of Alameda County. S. P. Hall, Judge.

The facts are stated in the opinion.

B. McFadden, for Appellant.

The contract having been fully performed by the plaintiff, it is taken out of the statute of frauds. (*Hoffman v. Fett*, 39 Cal. 109; *Bates v. Babcock*, 95 Cal. 479, 488;¹ *Coward v. Clinton*, 79 Cal. 23; *Niland v. Murphy*, 73 Wis. 326; *Breaux*

v. *Simon*, 132 N. Y. 280;¹ *Towley v. Moore*, 30 Ohio St. 185.²) The amendment of the answer changing an express admission of the contract to a denial thereof was not "in furtherance of justice." (Code Civ. Proc., sec. 473.) Facts alleged in the complaint and admitted in the answer become admitted facts in the case (*Merguire v. O'Donnell*, 103 Cal. 50), and are conclusive against the defendant (*Blankman v. Vallejo*, 15 Cal. 638, 645; *Doll v. Good*, 38 Cal. 287), and no evidence thereof is required. (*McGowan v. McDonald*, 111 Cal. 57;³ *McDonald v. Poole*, 113 Cal. 437; *Plass v. Plass*, 121 Cal. 131.)

J. E. McElroy, for Respondent.

The contract being oral, the plaintiff was not entitled to recover. (*McCarthy v. Loupe*, 62 Cal. 299; *Myres v. Surryhne*, 67 Cal. 657; *Zeimer v. Antisell*, 75 Cal. 509; *Toomey v. Dunphy*, 86 Cal. 639; *Platt v. Butcher*, 112 Cal. 634; *McGeary v. Satchwell*, 129 Cal. 389; *McPhail v. Buell*, 87 Cal. 115; *Shanklin v. Hall*, 100 Cal. 26.) The amendment of the answer was in the discretion of the court. (10 Am. & Eng. Ency. of Plead. & Prac., 518; *Crosby v. Clark*, 132 Cal. 1; *McDougald v. Hulet*, 132 Cal. 154; *Palace Hardware Co. v. Smith*, 134 Cal. 351; *Kirstein v. Madden*, 38 Cal. 163; *Dorn v. Baker*, 96 Cal. 206.) Appellant was not prejudiced by the amendment, and the allowance cannot be ground for reversal. (*Green v. Burr*, 131 Cal. 236; *Shadburne v. Daly*, 76 Cal. 355; *Beronio v. Southern Pacific Co.*, 86 Cal. 415;⁴ *Bulwer Con. M. Co. v. Standard Con. M. Co.*, 83 Cal. 613; *Southern Pacific Co. v. Purcell*, 77 Cal. 69.)

GRAY, C.—The complaint alleges that one Snyder is a real-estate agent and broker, and sets forth a cause of action in the first count on a contract for commissions on a sale of real estate for defendant by said Snyder. In the second count of the complaint a cause of action is alleged "on account of services of the value of \$562.50 theretofore and within two years next last past rendered by him (said Snyder) for said defendant at her special instance and request." Plaintiff sues as the assignee of Snyder. The defendant in

¹ 28 Am. St. Rep. 570, and note.

² 52 Am. St. Rep. 149.

³ 27 Am. Rep. 434.

⁴ 21 Am. St. Rep. 57.

her first amended answer admitted the contract with Snyder, but averred that the same was made by her as "administratrix of the estate of Maurice Hyde, deceased, and in no other capacity and not otherwise." Defendant also alleged as a separate defense that the contract of employment of Snyder set out in the complaint was made orally and not in writing, and that the same "is barred and invalid by the provisions of subdivision 6 of section 1624 of the Civil Code of the state of California."

The case went to trial on the issues thus made by the first amended answer. The plaintiff seems to have assumed the burden of showing that the contract of employment was in writing, for upon the trial he introduced in evidence a receipt signed by defendant's attorney in the estate referred to, a report of a sale of real estate made in the matter of said estate, and a check drawn by the purchaser at said sale. These documents, the appellant now urges, constitute a memorandum sufficient to satisfy the statute of frauds pleaded. We therefore presume that they were introduced for that purpose upon the trial. We can see no other possible use for them. After the introduction of the foregoing documents the plaintiff called Snyder as a witness, who testified to the reasonable value of his services in making the sale, and placed in evidence a written assignment of his claim to plaintiff. Thereupon plaintiff rested his case, and the defendant immediately moved to be permitted to amend her amended answer by changing the admission of the contract of employment into a denial of the same. Against the objection and exception of plaintiff, defendant was allowed thus to amend her answer. The court then informed the plaintiff that he might introduce any further evidence he might think necessary. But plaintiff put in no further evidence, and the defendant thereupon moved for a nonsuit on the grounds that "plaintiff has not made out a case against the defendant," that the contract of employment set forth in the complaint is not supported by any competent evidence; "and also that the case is one violative of subdivision 6 of section 1624 of the Civil Code." The nonsuit was granted and judgment in defendant's favor accordingly rendered.

Plaintiff appeals from the judgment, and the points urged by him are two in number. He says that it was not in furtherance of justice, and was an abuse of discretion to allow

the last amendment to the answer, and that the court erred in granting the nonsuit.

The answer as it stood before the final amendment to it did not admit the validity of the contract employing Snyder. as appellant seems to assume, but, on the contrary, it admitted that such an oral contract was entered into, but pleaded that the same was invalid because not in writing, and instead of waiving the statute of frauds, specially pleaded it, and thereby claimed the benefit of it. It is well said in *Burt v. Wilson*. 28 Cal. 638,¹ that "if a defendant sought to be charged upon a contract within the statute of frauds, admits the contract in his answer, and does not claim the benefit of the statute, he is considered as waiving its protection and as furnishing by his answer the very proof which the statute requires. But if the admission is coupled with a claim to the protection of the statute, the rights of the party stand as though the admission had not been made (2 Story's Equity Jurisprudence, sec. 757)." The last amendment to the answer, then, was not of much importance, as defendant's real defense was the statute of frauds, and she could have had the full benefit of this defense, and was entitled to the nonsuit without the final amendment to her answer, because the defendant had failed to show any valid contract of employment, there being no reference to any employment or agreement for commissions or other compensation in any of the writings introduced in evidence by him. It is true that it was not necessary that plaintiff should allege in his complaint that the contract was in writing. It would be presumed to be in writing from the allegation that such a contract was made, but when the plaintiff came to his proofs his assumption that the burden was on him, the statute being pleaded, not only to show a contract but a valid contract, was undoubtedly correct. And to do this he must show that the contract of employment was in writing. (Browne on Statute of Frauds, 5th ed., sec. 535.) This he failed to do, and there being no admission of a valid contract, but a special plea that the contract relied on was invalid, the nonsuit was properly granted, on the ground of the statute of frauds relied on by defendant in her answer. There was neither error nor impropriety in the action of the court in allowing the final amendment to the answer, for while the nonsuit could with propriety have been granted without the amendment and the

amendment was perhaps not strictly necessary, yet there was a possible ambiguity in the answer which could be and was obviated by the amendment. The court should always be liberal in allowing amendments which may remove a possible ambiguity in a pleading, and we see no abuse of discretion in this instance.

There being no contract of employment in writing, it is clear also that plaintiff is not entitled to recover the reasonable value of the services under the second count of his complaint. This question has long been settled by the decisions of this court. (*McCarthy v. Loupe*, 62 Cal. 299; *Myres v. Surryhne*, 67 Cal. 657; *McGeary v. Catchwell*, 129 Cal. 389.)

We advise that the judgment be affirmed.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Van Dyke, J., Shaw, J., Angellotti, J.

[Crim. No. 994. Department Two.—November 28, 1903.]

THE PEOPLE, Respondent, v. SAMUEL McDANIELS,
Appellant.

CRIMINAL LAW—MOTION TO SET ASIDE INFORMATION—SIGNATURE TO COMPLAINT—MARK—ATTESTATION—JURAT OF JUSTICE.—Upon a motion to set aside an information for insufficiency of the signature to the complaint for arrest of the defendant, a signature by the mark of the complainant, made after his initials and before his surname, accompanied by the jurat of the justice of the peace that the complaint was subscribed and sworn to before him, will be deemed sufficient. It will be presumed that the name of the complainant, written near the mark, was written by the justice; and his signature to the jurat was a sufficient attestation of the mark.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial. George E. Church, Judge.

The facts are stated in the opinion.

S. J. Hinds, for Appellant.

U. S. Webb, Attorney-General, and C. N. Post, Assistant Attorney-General, for Respondent.

GRAY, C.—Defendant appeals from a judgment convicting him of burglary in the second degree, and from an order denying him a new trial.

In the court below the appellant moved to set aside the information on the ground that he had not been legally committed by a magistrate. The point made upon this motion was, that the original complaint filed in the justice's court as a foundation for a warrant of arrest and a preliminary examination before the magistrate was not subscribed in proper form by the complaining witness. In support of the motion nothing seems to have been introduced in evidence except the original complaint, a copy of which is brought to this court in a bill of exceptions. The complaint, as appears from this copy, is in the form of an affidavit, and begins with "Personally appeared before me this ninth day of November, 1902, B. H. Brown, of Squaw Valley, in the county of Fresno, who, first being duly sworn, complains and accuses Samuel McDaniels of the crime of burglary, committed as follows:" and then follows a sufficient charge of burglary against the defendant, and a prayer for a warrant for the arrest of McDaniels, "and that he may be dealt with according to law." The complaint is signed immediately following this prayer

his
as follows: "B. H. X Brown," and immediately following
mark

this is the usual jurat, "Subscribed and sworn to before me this 9th day of November, A. D. 1902.

"C. P. WALTON,
"Justice of the Peace Seventh Township, County of Fresno."

It is urged that this was not a signing of the complaint by the complaining witness within the meaning of section 7 of the Penal Code. Waiving the question as to whether or not it is proper on this appeal to consider the question of the sufficiency of the original complaint, we are of opinion that the

objection made to it is not well taken. Whether the justice of the peace who signed the jurat to the affidavit also wrote the name of the complainant near his mark could have been and was no doubt ascertained by the trial court on an inspection of the original affidavit and a comparison of the handwriting in the two names. From the fact that the justice certifies that the affidavit was subscribed before him, he will presume that the statute was complied with, and that the justice wrote the name of the complainant where it appears at the end of the complaint. Error must be made to appear by the party alleging it, and we are permitted to indulge all reasonable presumptions in the absence of a contrary showing to uphold the regularity of the ruling of the court below.

The name of the subscribing witness having been written by the justice near the mark, all that was left for the latter to do under section 7 of the Penal Code was to write his own name as a witness. This he did when he appended his autograph to the jurat. The language of the jurat, "Subscribed," etc., "before me," is evidence of that fact. It is not necessary that he should write the word "witnessed,"—any equivalent expression would serve as well. Nor was it necessary that he should write his name twice. One signature could and did witness both the previous signature and the jurat. No reason is suggested, and we cannot see any reason why the officer taking the affidavit should not be permitted also to witness the mark or other signature of the affiant. Indeed, it would seem that the primary object and purpose of the signature of the officer to the jurat is to witness the signature of the affiant to the affidavit. It is not any the less a witnessing because the affiant has merely made his mark. There can be no sense or reason in his witnessing it more than once. We think this view is upheld in *In re Guilfoyle*, 96 Cal. 598. In that case the decedent signed a will with his mark. Following this was the word "witnesses," followed by the signatures of three witnesses. These three signatures seem to have been treated without question as witnessing both the will and the mark of the testator and making of the latter a proper signature under the provisions of section 14 of the Civil Code, which is substantially the same as section 7 of the Penal Code in this respect.

The motion to set aside the information was properly denied.

We advise that the judgment and order be affirmed.

Cooper, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

[L. A. No. 967. In Bank.—November 28, 1903.]

LEAH J. KATZ, Executrix, etc., et al., Appellants, v. MARGARET D. WALKINSHAW, Respondent.

WATER-RIGHTS — PERCOLATING WATERS — ARTESIAN BELT — RIPARIAN RIGHTS.—An underground body of water lying in an artesian belt, which does not flow in any defined stream, but is produced by percolation through saturated soil, and is pressed forward by water accumulating from ravines, canyons, and streams above, pressing down into the soil by percolation, is not a watercourse, and is not governed by the law of riparian rights.

ID.—RIGHTS OF OWNERS OF PERCOLATING WATER—REASONABLE USE—INTERFERENCE WITH PERCOLATION.—Each owner of soil lying in a belt which becomes saturated with percolating water is entitled to a reasonable use thereof on his own land, notwithstanding such reasonable use may interfere with water percolation in his neighbors' soil; but he has no right to injure his neighbors by an unreasonable diversion of the water percolating in the belt for the purpose of sale or carriage to distant lands.

ID.—MAXIM APPLICABLE.—The maxim, *Sic utere tuo ut alienum non laedas*, is applicable as between adjoining users of percolating water, whenever justice requires its application.

ID.—DIVERSION FROM ARTESIAN BELT FOR SALE—INJUNCTION.—The owners of artesian wells sunk in an artesian belt of percolating water, the waters from which are necessary for domestic use and irrigation of their lands, on which are growing trees, vines, shrubbery, and other plants of great value, are entitled to an injunction to restrain the diversion of the water percolating in the artesian belt, by an owner of land situated in the belt, for the purpose of conveying the same to distant lands for sale, to the irreparable injury of the plaintiffs.

ID.—PLEADING—SUBTERRANEAN STREAM—INJURY TO ARTESIAN WELLS—SURPLUSAGE.—Where the complaint for the injunction stated in substance that plaintiffs had wells in their respective tracts, from which water flowed to the surface of the ground, which was necessary for domestic use and irrigation of their lands, and that the

defendant by means of wells and excavations on her own lands drew the waters from plaintiffs' lands and conveyed them to distant lands, it states a cause of action for an injunction to restrain the diversion of percolating water; and an averment that the diversion was from an underground stream may be regarded as surplusage.

ID.—EVIDENCE—IMPROPER NONSUIT.—Where the evidence supported the cause of action for wrongful diversion of percolating water from the lands of plaintiffs to their irreparable injury, a nonsuit should not have been granted, though the allegation of diversion from a subterranean stream was not proved.

ID.—APPLICABILITY OF COMMON LAW—VARYING CONDITIONS—CESSATION OF RULE.—Such parts of the common law of England as are not adapted to our condition, form no part of the law of this state. The common law, by its own principle, adapts itself to varying conditions, and modifies its rules so as to subserve the ends of justice under different circumstances, and recognizes the principle embodied in section 3510 of the Civil Code, that "when the reason of a rule ceases, so should the rule."

ID.—RULE AS TO PERCOLATING WATER INAPPLICABLE.—The common-law rule that percolating water belongs unqualified to the owner of the soil, and that he has the absolute right to extract and sell it, is not applicable to the conditions existing in a large part of this state, where artificial irrigation is essential to agriculture, and artesian wells in percolating belts are necessarily used for that purpose.

ID.—DIFFICULTIES IN PREVENTING DIVERSION.—The difficulties that the courts will meet in securing persons necessarily using percolating water for irrigation by means of artesian wells from the infliction of great wrong and injustice by its diversion, if property right therein is recognized, cannot justify the court in abandoning the task as impossible. The courts can protect this particular species of property in water as effectually as water-rights of any other description.

ID.—RULES APPLICABLE—PRIORITY—CORRELATIVE RIGHTS—INJUNCTIONS.—The rules respecting priority of appropriation and correlative rights in regard to the appropriation and use of percolating water include the right to appropriate any surplus not needed for use by well-owners on their lands, and an equitable adjustment of disputes between overlying landowners, where the supply is insufficient for all, and proper rules relative to injunctions and the remedy at law should be applied to the solution of questions arising in the courts as to such waters.

APPEAL from a judgment of the Superior Court of San Bernardino County. John L. Campbell, Judge.

The main facts are stated in the opinion of the court on the original hearing in Bank. Further facts are stated in the opinion of the court on rehearing.

C. C. Haskell, Rolfe & Rolfe, and H. C. Rolfe, for Appellants.

One cannot divert surface, or underground, or percolating water to the injury of another, unless it is done to protect or benefit his own land. He cannot conduct it to a distance on other lands or divert it so as to injure his neighbor's land. (*Case v. Hoffman*, 84 Wis. 438;¹ Gould on Waters, 263; *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569;² *Sweet v. Cutter*, 50 N. H. 439;³ *Bartlett v. O'Connor*, (Cal.) 36 Pac. Rep. 513; *Wheatley v. Baugh*, 25 Pa. St. 528;⁴ *Herriman Irr. Co. v. Butterfield Min. etc. Co.*, 19 Utah, 453; *Smith v. City of Brooklyn*, 18 App. Div. 340; 46 N. Y. Supp. 147; *Forbell v. City of New York*, 56 N. Y. Supp. 790; 164 N. Y. 522.⁵)

G. H. Gould, *Amicus Curiae*, also for Appellants.

Percolating waters cannot be taken away from a soil-owner who has a beneficial use of them to his injury without beneficial use on the land of the taker. (*City of Los Angeles v. Pomeroy*, 124 Cal. 621, 644; *Hanson v. McCue*, 42 Cal. 303.⁶) Many equities in percolating water must be recognized and protected, and the first step toward a clear view of the subject should be in the direction of abolishing an antiquated and misleading formula.

Byron Waters, for Respondent; R. E. Houghton, for Riverside Water Company; E. W. Freeman, for Temescal Water Company, John E. Daly, and Henry J. Stevens, for Glendora-Azusa Water Company; Lucius K. Chase, for Corona City Water Company; Henry J. Stevens, for Citrus Belt Water Company; C. H. Wilson, for Corona Irrigation Company; M. B. Kellogg, for Gage Canal Company; Page, McCutchen, Harding & Knight, for Contra Costa Water Company; Houghton & Houghton, for Miller & Lux and Frederick Cox, Frank H. Short, Otis & Gregg, Howard Surr, Platt & Bayne, and Henley C. Booth, City Attorney of Santa Barbara, *Amici Curiae*, also for Respondent.

The plaintiff can only recover on the cause of action alleged, which is for diversion of a subterranean stream, and not for diversion of percolating water. A plaintiff cannot

¹ 86 Am. St. Rep. 937.

⁴ 64 Am. Dec. 721, and note.

² 82 Am. Dec. 179.

⁵ 79 Am. St. Rep. 666.

³ 9 Am. Rep. 276, and note.

⁶ 10 Am. Rep. 299.

recover on a different cause of action from that alleged. (*Mandran v. Goux*, 51 Cal. 151; *Reed v. Norton*, 99 Cal. 617, 619; *Eastlick v. Wright*, 121 Cal. 309; *Kelly v. Plover*, 103 Cal. 35; *Riverside Water Co. v. Gage*, 108 Cal. 240, 244; *Rudel v. Los Angeles County*, 118 Cal. 281, 286; *Wallace v. Farmers' Ditch Co.*, 130 Cal. 578, 583; *Schirmer v. Drexler*, 134 Cal. 134, 139.) The law of California is settled that percolating water belongs absolutely to the owner of the soil, with the right to use and divert it as the owner sees fit. (*Hanson v. McCue*, 42 Cal. 303;¹ *Painter v. Pasadena L. and W. Co.*, 91 Cal. 74, 82; *Southern Pacific Co. v. Dufour*, 95 Cal. 616; *Gould v. Eaton*, 111 Cal. 641;² *City of Los Angeles v. Pomeroy*, 124 Cal. 597; *Vineland Irr. Dist. v. Azusa Pl. Dist.*, 126 Cal. 486.) The California law on this subject accords with the great weight of American and English authorities. (27 Am. & Eng. Ency. of Law, 425; *Breuning v. Dorr*, 23 Colo. 195; *Wilson v. Ward*, 26 Colo. 39; *Roath v. Driscoll*, 20 Conn. 533;³ *Brown v. Ilius*, 25 Conn. 593; S. C. 27 Conn. 84;⁴ *Metcalfe v. Nelson*, 8 S. Dak. 89;⁵ *Deadwood Cent. R. Co. v. Barker*, 14 S. Dak. 558; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586;⁶ *Saddler v. Lee*, 66 Ga. 45;⁷ *Warmack v. Brownlee*, 84 Ga. 196; *Edward v. Haeger*, 180 Ill. 99; *New Albany etc. R. R. Co. v. Peterson*, 14 Ind. 116; *Taylor v. Fickas*, 64 Ind. 172;⁸ *City of Emporia v. Soden*, 25 Kan. 588;⁹ *Kinnigird v. Standard Oil Co.*, 89 Ky. 473;¹⁰ *Chase v. Silverstone*, 62 Me. 175;¹¹ *Chesley v. King*, 74 Me. 164;¹² *Greenleaf v. Francis*, 18 Pick. 117; *Wilson v. New Bedford*, 108 Mass. 26; *Davis v. Spaulding*, 157 Mass. 431; *Upjohn v. Richland Twp.*, 46 Mich. 549;¹³ *Ocean Grove C. M. Assn. v. Asbury Park*, 40 N. J. Eq. 447; *Ellis v. Duncan*, 21 Barb. 230; *Dehli v. Youmans*, 50 Barb. 305; *Goodale v. Tuttle*, 29 N. Y. 459; *Trustees of Dehli v. Youmans*, 45 N. Y. 362;¹⁴ *Bliss v. Greeley*, 45 N. Y. 671;¹⁵ *Johnstown etc. Co. v. Veght*, 69 N. Y. 16;¹⁶

¹ 10 Am. Dec. 299.² 52 Am. St. Rep. 201.³ 52 Am. Dec. 352.⁴ 71 Am. Dec. 49.⁵ 59 Am. St. Rep. 746.⁶ 53 Am. St. Rep. 262.⁷ 42 Am. Rep. 62.⁸ 31 Am. Rep. 114.⁹ 37 Am. Rep. 265.¹⁰ 25 Am. St. Rep. 545.¹¹ 16 Am. Rep. 419.¹² 43 Am. Rep. 569.¹³ 41 Am. Rep. 178.¹⁴ 6 Am. Rep. 100.¹⁵ 6 Am. Rep. 157.¹⁶ 25 Am. Rep. 125.

Phelps v. Nowlen, 72 N. Y. 39;¹ *Bloodgood v. Ayers*, 108 N. Y. 400;² *Frazier v. Brown*, 12 Ohio St. 300; *Elster v. Springfield*, 49 Ohio St. 100; *Taylor v. Welch*, 6 Or. 199; *Sullivan v. Mining Co.*, 11 Utah, 441; *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah, 444, 451;³ *Willow Creek Irr. Co. v. Michaelson*, 21 Utah, 248;⁴ *Chatfield v. Wilson*, 28 Vt. 49; 31 Vt. 357; *Harwood v. Benton*, 32 Vt. 742, 737; *Wheelock v. Jacobs*, 70 Vt. 162;⁵ *Miller v. Black Rock etc. Co.*, 99 Vt. 747;⁶ *Meyer v. Tacoma L. and P. Co.*, 8 Wash. 144, 147; *Acton v. Blundell*, 12 Mees. & W. 324; *New River Co. v. Johnson*, 2 EL. & E. 405.)

SHAW, J.—A rehearing was granted in this case for the purpose of considering more fully, and by the aid of such additional arguments as might be presented by persons not parties to the action, but vitally interested in the principle involved, a question that is novel and of the utmost importance to the application to useful purposes of the waters which may be found in the soil.

Petitions for rehearing were presented not only in behalf of the defendant, but also on behalf of a number of corporations engaged in the business of obtaining water from wells and distributing the same for public and private use within this state, and particularly in the southern part thereof. Able and exhaustive briefs have been filed on the rehearing. The principle decided by the late Justice Temple in the former opinion, and the course of reasoning by which he arrived at the conclusion, have been attacked in these several briefs and petitions with much learning and acumen. It is proper that we should here notice some of the objections thus presented.

It is urged, in the first place, that the decision goes beyond the case that was before the court; that the pleadings stated a cause of action solely for the diversion of water from an alleged underground stream, and that, therefore, there was no occasion for a discussion of the principles governing the rights to waters of the class usually denominated percolating waters. The proposition is not tenable. The complaint, in substance,

¹ 28 Am. Rep. 93.

² 2 Am. St. Rep. 443.

³ 70 Am. St. Rep. 810.

⁴ 81 Am. St. Rep. 687.

⁵ 67 Am. St. Rep. 659, and note.

⁶ 86 Am. St. Rep. 924.

states that the plaintiffs had wells upon their respective tracts of land, from which water flowed to the surface of the ground; that the water was necessary for domestic use and irrigation on the lands on which they were situate; that the defendant, by means of other wells and excavations upon another tract of land in the vicinity prevented any water from flowing through the plaintiffs' wells to their premises, and that this was done by drawing off the water through the wells of the defendant, taking it to a distant tract and there using it. If the principle is correct that the defendant cannot thus, and for this purpose, take from the plaintiffs' wells the percolating waters from which they are supplied, then no further allegations were necessary, and the averment that the water constituted part of an underground stream may be regarded as surplusage. The complaint was thus treated in the opinion of Justice Temple, and he properly considered the question whether or not, eliminating the surplus allegation that there was an underground stream, the complaint stated a cause of action which was sustained by the evidence. The fact that the court below supposed that the existence of a stream of water was necessary to make the diversion of the water an actionable wrong does not limit this court to the same view, if it be erroneous. If enough of the facts which are set forth in the complaint are established by the evidence, without substantial conflict, to constitute a good cause of action, then the nonsuit should not have been granted, although other allegations are not proven.

Many arguments, objections, and criticisms are presented in opposition to the rules and reasoning of the former opinion. It is contended that the rule that each landowner owns absolutely the percolating waters in his land, with the right to extract, sell, and dispose of them as he chooses, regardless of the results to his neighbor, is part of the common law, and as such has been adopted in this state as the law of the land by the statute of April 13, 1850, (Stats. 1850, 219,) and by section 4468 of the Political Code, and that, consequently, it is beyond the power of this court to abrogate or change it; that the question comes clearly within the doctrine of *stare decisis*; that the rule above stated has become a rule of property in this state upon the faith of which enormous investments have been made, and that it should not now be de-

parted from, even if erroneous; that even if the question were an open one, the adoption of the doctrine of correlative rights in percolating waters would hinder or prevent all further developments or use of underground waters, and endanger or destroy developments already made, thus largely restricting the productive capacity and growth of the state, and that, therefore, a sound public policy and regard for the general welfare demand the opposite rule; that the doctrine of reasonable use of percolating waters would require an equitable distribution thereof among the different landowners and claimants who might have rights therein, that this would throw upon the courts the duty and burden of regulating the use of such waters and the flow of the wells or tunnels, which would prove a duty impossible of performance; and, finally, that if this rule is the law as to percolating waters, it must for the same reason be the law with regard to the extraction of petroleum from the ground, and, if so, it would entirely destroy the oil development and production of this state, and for that reason also that it is against public policy and injurious to the general welfare.

The idea that the doctrine contended for by the defendant is a part of the common law adopted by our statute, and beyond the power of the court to change or modify, is founded upon a misconception of the extent to which the common law is adopted by such statutory provisions, and a failure to observe some of the rules and principles of the common law itself. In *Crandall v. Woods*, 8 Cal. 143, the court approved the following rule, quoting from the dissenting opinion of Bronson, J., in *Starr v. Child*, 20 Wend. 159: "I think no doctrine better settled than that such portions of the law of England as are not adapted to our condition form no part of the law of this state. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as are framed with special reference to the physical condition of a country differing widely from our own. It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a case where that reason utterly fails." This quotation was subsequently approved by the New York court of appeals. (*People v. Appraisers*, 33 N. Y. 461.) The same doctrine was followed in

the case of *English v. Johnson*, 17 Cal. 116.¹ In Pennsylvania and West Virginia, under similar statutes, it was held that only such parts of the common law as were applicable to the local situation of the particular state were in force (*Carson v. Blazer*, 2 Binn. 484;² *Powell v. Sims*, 5 W. Va. 4³), and this is the rule in all the states upon the question, irrespective of statutory adoption. (*Commonwealth v. Knowlton*, 2 Mass. 534; *State v. Rollins*, 8 N. H. 560; *Pierce v. State*, 13 N. H. 542; *Currier v. Perley*, 24 N. H. 223; *Dennett v. Dennett*, 43 N. H. 499; *Van Ness v. Pacard*, 2 Pet. 144; *Wheaton v. Peters*, 8 Pet. 659; *Bloom v. Richards*, 2 Ohio St. 391.)

The true doctrine is, that the common law by its own principles adapts itself to varying conditions, and modifies its own rules so as to serve the ends of justice under the different circumstances, a principle adopted into our code by section 2510 of the Civil Code: "When the reason of a rule ceases, so should the rule itself." This is well stated in *Morgan v. King*, 30 Barb. 16: "We are not bound to follow the letter of the common law, forgetful of its spirit; its *rule* instead of its *principle*. A rule of law applicable to the fresh-water streams of England may be wholly inapplicable to fresh-water streams in this country of the same nature and character, because of different capacity, or because the adjoining country may furnish a commerce for them unknown in England, and yet be subject to the same principle. If so, the common law modifies its rules upon its own principles, and conforms them to the wants of the community, the nature, character, and capacity of the subject to which they are to be applied." In *Beardsley v. Hartford*, 50 Conn. 542,⁴ the court says: "It is a well-settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim: '*Cessante ratione, cessat ipsa lex.*' This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which, in the progress of society, gain controlling force, the old law, though still good as an abstract principle,

¹ 76 Am. Dec. 574.

² 4 Am. Dec. 463.

³ 18 Am. Rep. 629.

⁴ 47 Am. Rep. 677.

and good in its application to some circumstances, must cease to apply or to be a controlling principle to the new circumstances." Accordingly, in many instances in this country, in states where the common law is held to be in force, some of its rules are held to be not applicable to the conditions different from the place of its origin. (*Connolly v. Goodwin*, 5 Cal. 221; *Ricketts v. Johnson*, 8 Cal. 36; *United States v. McCarthy*, 18 Fed. 89; 21 Blatchf. 469; *Bovard v. Kettering*, 101 Pa. St. 185; *Haywood v. Shreve*, 44 N. J. L. 96; *Green v. Liler*, 8 Cranch, 249; *Cole v. Lake*, 54 N. H. 286; *Pettingill v. Rideout*, 6 N. H. 454;¹ *Boston and W. R. C. v. Dana*, 1 Gray, 97; *Lindsley v. Coats*, 1 Ohio, 243; *Stoeber v. Whitman*, 6 Binn. 420; *Dawson v. Coffman*, 28 Ind. 223; *Wagner v. Bissell*, 3 Iowa, 496; *Reaume v. Chambers*, 22 Mo. 54; *Seeley v. Peters*, 10 Ill. 130; *Collins v. Chartiers V. G. Co.*, 131 Pa. St. 143;² in which case this same doctrine of the absolute ownership in percolating water was modified; *Harris v. Harrison*, 93 Cal. 676, and *Wiggins v. Muscupiabe Co.*, 113 Cal. 182,³ in which last-mentioned cases the common law respecting riparian rights was said to have been modified in this state to suit our peculiar conditions.) Whenever it is found that, owing to the physical features and character of this state, and the peculiarities of its climate, soil, and productions, the application of a given common-law rule by our courts tends constantly to cause injustice and wrong, rather than the administration of justice and right, then the fundamental principles of right and justice on which that law is founded, and which its administration is intended to promote, require that a different rule should be adopted, one which is calculated to secure persons in their property and possessions, and to preserve for them the fruits of their labors and expenditures. The question whether or not the rule contended for is a part of the common law applicable to this state depends on whether it is suitable to our conditions under the rule just stated.

It is necessary, therefore, to state the conditions existing in many parts of this state which are different from those existing where the rule had its origin.

¹ 25 Am. Dec. 473.

² 54 Am. St. Rep. 337.

³ 17 Am. St. Rep. 791.

In a large part of the state, and in almost all of the southern half of it, particularly south of the Tehachapi range of mountains, aside from grains, grasses, and some scant pasturage, there is practically no production by agriculture except by means of artificial irrigation. In a few places favored by nature crops are nourished by natural irrigation, due to the existence underneath the ordinary soil of a saturated layer of sand or gravel, but these places are so few that they are of no consequence in any general view of the situation. Irrigation in these regions has always been customary, and under the Spanish and Mexican governments it was fostered and encouraged. Even in the earlier periods of the settlement of the country, after its acquisition by the United States, and while the population was sparse and scattered compared to the present time, the natural supply of water from the surface streams, as diverted and applied by the crude and wasteful methods then used, was not considered more than was necessary. As the population increased, better methods of diversion, distribution, and application were adopted, and the streams were made to irrigate a very much larger area of land. While this process was going on a series of wet years augmented the streams, and still more land was put under the irrigating systems. Recently there has followed another series of very dry years, which has correspondingly diminished the flow of the streams. After this period began it was soon found that the natural streams were insufficient. The situation became critical, and heavy loss and destruction from drought was imminent. Still the population continued to increase, and with it the demand for more water to irrigate more land. Recourse was then had to the underground waters. Tunnels were constructed, more artesian wells bored, and finally pumps driven by electric or steam power were put into general use to obtain sufficient water to keep alive and productive the valuable orchards planted at the time when water was supposed to be more abundant. The geological history and formation of the country is peculiar. Deep borings have shown that almost all of the valleys and other places where water is found abundantly in percolation were formerly deep canyons or basins, at the bottoms of which anciently there were surface streams or lakes. Gravel, boulders, and occasionally pieces of driftwood have been found

near the coast far below tide-level, showing that these sunken stream-beds were once high enough to discharge water by gravity into the sea. These valleys and basins are bordered by high mountains, upon which there falls the more abundant rain. The deep canyons or basins in course of ages have become filled with the washings from the mountains, largely composed of sand and gravel, and into this porous material the water now running down from the mountains rapidly sinks and slowly moves through the lands by the process usually termed percolation, forming what are practically underground reservoirs. It is the water thus held or stored that is now being taken to eke out the supply from the natural streams. In almost every instance of a water supply from the so-called percolating water, the location of the well or tunnel by which it is collected is in one of these ancient canyons or lake basins. Outside of these there is no percolating water in sufficient quantity to be of much importance in the development of the country or of sufficient value to cause serious litigation. It is usual to speak of the extraction of this water from the ground as a development of a hitherto unused supply. But it is not yet demonstrated that the process is not in fact, for the most part, an exhaustion of the underground sources from which the surface streams and other supplies previously used have been fed and supported. In some cases this has been proven by the event. The danger of exhaustion in this way threatens surface streams as well as underground percolations and reservoirs. Many water companies, anticipating such an attack on their water supply, have felt compelled to purchase, and have purchased, at great expense, the lands immediately surrounding the stream or source of supply, in order to be able to protect and secure the percolations from which the source was fed. Owing to the uncertainty in the law, and the absence of legal protection, there has been no security in titles to water-rights. So great is the scarcity of water under the present demands and conditions that one who is deprived of water which he has been using has usually no other source at hand from which he can obtain another supply.

The water thus obtained from all these sources is now used with the utmost economy, and is devoted to the production of citrus and other extremely valuable orchard and vineyard

crops. The water itself, owing to the tremendous need, the valuable results from its application, and the constant effort to plant more orchards and vineyards to share in the great profits realized therefrom, has become very valuable. In some instances it has been known to sell at the rate of fifty thousand dollars for a stream flowing at the rate of one cubic foot per second. Notwithstanding the great drain on the water supply, the economy in the distribution and application, and the much larger area of land thereby brought under irrigation, there still remain large areas of rich soil which are dry and waste for want of water. This abundance of land, with the scarcity and high price of water, furnish a constant stimulus to the further exhaustion of the limited amount of underground water, and a constant temptation to invade sources already appropriated. The charms of the climate have drawn, and will continue to draw, immigrants from the better classes of the eastern states, composed largely of men of experience and means, energetic, enterprising, and resourceful. With an increasing population of this character, it is manifest that nothing that is possible to be done to secure success will be left undone, and that there must ensue in years to come a fierce strife, first to acquire and then to hold every available supply of water.

It is scarcely necessary to state the conditions existing in other countries referred to, to show that they are vastly different from those above stated. There the rainfall is abundant, and water, instead of being of almost priceless value, is a substance that in many instances is to be gotten rid of rather than preserved. Drainage is there an important process in the development of the productive capacity of the land, and irrigation is unknown. The lands that from their situation in this country are classed as damp lands would in those countries be either covered by lakes or would be swamps and bogs. If one is deprived of water in those regions, there is usually little difficulty in obtaining a sufficient supply near by, and at small expense. The country is interlaced with streams of all sizes from the smallest brooklet up to large navigable rivers, and the question of the water supply has but little to do with the progress or prosperity of the country.

It is clear also that the difficulties arising from the scarcity of water in this country are by no means ended, but, on the

contrary, are probably just beginning. The application of the rule contended for by the defendants will tend to aggravate these difficulties rather than solve them. Traced to its true foundation, the rule is simply this: that owing to the difficulties the courts will meet in securing persons from the infliction of great wrong and injustice by the diversion of percolating water, if any property right in such water is recognized, the task must be abandoned as impossible, and those who have valuable property acquired by and dependent on the use of such water must be left to their own resources to secure protection for their property from the attacks of their more powerful neighbors, and failing in this, must suffer irretrievable loss; that might is the only protection.

"The good old rule
Sufficeth them, the simple plan,
That they should take who have the power,
And they should keep who can."

The field is open for exploitation to every man who covets the possessions of another or the water which sustains and preserves them, and he is at liberty to take that water if he has the means to do so, and no law will prevent or interfere with him or preserve his victim from the attack. The difficulties to be encountered must be insurmountable to justify the adoption or continuance of a rule which brings about such consequences.

The claim that the doctrine stated by Mr. Justice Temple is contrary to all the decisions of this court is not sustained by an examination of the cases. The decisions have not been harmonious, and in many of them what is said on this subject is mere *dictum*. A brief review of the cases will demonstrate this to be true. In *Hanson v. McCue*, 42 Cal. 303,¹—the first case on the subject,—it was not necessary for the court to say anything at all with respect to the right of a landowner to complain of a diversion of percolating waters. McCue's predecessor had made a ditch leading from a spring on his land across a tract of land belonging to Hanson's predecessor, and terminating upon another tract, also owned by McCue's predecessor, through which ditch he conducted water from the spring across the Hanson tract to his other land. This ditch

¹ 10 Am. Rep. 299.

in its course over Hanson's land leaked water in such quantities that it collected into a stream, which Hanson used for irrigation. This was the only foundation for the right which Hanson had or claimed to the water. The court properly held that he had no right to the waste water and that McCue was not bound to continue to maintain the artificial stream for Hanson's benefit, but could by any means he chose change the use of the spring and the course of the ditch. The fact that the change was made by intercepting the percolating water which fed the stream was not material to the case, and all that is said as to the right to do so is *dictum*. The opinion, however, does, though unnecessarily, announce and approve the doctrine contended for by the respondent here. *Huston v. Leach*, 53 Cal. 262, decides only that the phrase "waters of said springs," in the decree of the court meant defined streams running into or issuing from the springs, and did not include the percolations which fed the strings. *Hale v. McLea*, 53 Cal. 578, referred to a well-defined though very small underground stream, flowing through fissures in the rocks, and has no relation to ordinary percolating water. The court held that the defendant could not cut off the entire stream, and at most could only use a reasonable portion thereof as an upper riparian owner. In *Cross v. Kitts*, 69 Cal. 217,¹ the court in its opinion, again by way of *dictum*, announces the doctrine that the owner of the soil is the absolute owner of the percolating water therein; but the decision is against this doctrine. It is a case of the court announcing one doctrine and deciding the contrary. The plaintiff, through a grant from defendant's predecessor, owned a right to take water on defendant's mining claim by means of a tunnel which served to collect the percolating water into a small stream of two miner's inches, which flowed out of the tunnel and was conducted by pipes to plaintiff's premises. This court decided that the defendant had no right to cut off the percolations which fed the stream issuing from the tunnel, although this was done in the legitimate work of mining his own land. The decision is in direct conflict with the *dictum* in *Hanson v. McCue*, 42 Cal. 303,² and is in accord with the principles laid down by Justice Temple. It can only be dis-

¹ 58 Am. Rep. 558.² 10 Am. Rep. 299.

tinguished upon the ground that the defendant was estopped by the grant of his predecessor to use the land so as to destroy the water-right granted—a distinction which is not mentioned or referred to in the opinion. The distinction made in the opinion, and upon which the decision in *Cross v. Kitts*, is based, is, that when percolating waters are gathered into a defined stream by means of a tunnel, the stream is property, and as such it is protected by law from injury or destruction by the diversion of such percolating water before it reaches the tunnel. There can be no distinction in law or reason between a stream consisting of percolating waters gathered together by means of a tunnel and one gathered by means of an artesian well. Therefore, the case supports Justice Temple's conclusion. The only point bearing upon the case at bar that was decided in *Painter v. Pasadena L. and W. Co.*, 91 Cal. 74, is, that the right of the owner of land to the water percolating therein may be reserved in a grant of the land, and that this right to such reserved water may subsequently be transferred. It does not touch the question of the extent of the right of the landowner to such water, as against the adjoining proprietors or others claiming rights in it. In *Southern Pacific R. R. Co. v. Dufour*, 95 Cal. 616, the decision was put upon the ground that the excavation of defendant, which caused the diversion of percolating water of which plaintiff complained, was made upon defendant's own land for the purpose of obtaining the water for the better use of the land, which it was held he had a right to do, although it destroyed the spring or stream claimed by the plaintiff. The *dictum* of *Hanson v. McCue* was approved. The decision seems to be in conflict with *Cross v. Kitts*, although the latter case is not mentioned. In *Gould v. Eaton*, 111 Cal. 639,¹ the court below found that the tunnel complained of gathered and discharged a stream of water of which all except one and forty-three hundredths miner's inches was gathered from percolating waters in the sandstone, which did not come from the channel of the natural stream. It was this excess only which was in issue. The finding that it was percolating water was held to be conclusive upon the appellate court. It appeared that some of the percolating water thus developed would, if not interrupted, have reached

¹ 52 Am. St. Rep. 201.

the natural stream. The court adopts and approves the *dictum* of *Hanson v. McCue*, and holds that the plaintiff had no legal right to enjoin a diminution of the natural stream caused by a diversion of percolating water before it reached the channel. In *Los Angeles v. Pomeroy*, 124 Cal. 622, an instruction of the court below stating the *dictum* of *Hanson v. McCue*, was criticised by the appellants, not for the reason that it restated that doctrine, but upon the ground that it did not class as percolating waters all such water as might be found in the sand or soil underneath the bed of a stream or adjacent thereto. So far as it restated the doctrine of *Hanson v. McCue*, it was favorable to the appellants, and, therefore, they did not object to that part of it. The court held that it was not subject to criticism on the ground that it did not properly define percolating waters. The decision, however, cannot be taken as an approval of the doctrine of *Hanson v. McCue*. In so far as that doctrine was stated, it being favorable to appellants, it was not presented for consideration to the appellate court. The objection of the appellants, and the point considered by the appellate court, was that the instruction departed from the rule quoted in *Hanson v. McCue*. Inasmuch as the writer of this opinion was also the writer of the instruction under consideration, it may be proper to say that he did not give the instruction because he approved that part of it restating the doctrine of *Hanson v. McCue*. The instruction was given because an instruction embodying that doctrine had been requested by the appellants in the case, and the respondents, the plaintiffs, believing that it would not materially affect the verdict, consented that that part should be given in substance, rather than take the chances of a reversal of the case, should the supreme court hold its refusal to be erroneous. The remarks of the court in *Vineland District v. Azusa District*, 126 Cal. 494, giving the ordinary definition of percolating waters, and stating the rule contended for by the defendant as applying thereto, call for no discussion. The court was referring to this solely for the purpose of giving the proper meaning to the word "percolating" as used in the findings, and to show that the word was not there used to designate waters which were not a part of the subterranean stream under consideration. In *Bartlett v. O'Connor*, 36 Pac. (Cal.) 513,

the defendants, with the intent to injure the plaintiff, attempted to reclaim their lands by drawing off the percolating water through an artificial ditch away from the natural stream. It appeared that this could have been done as well by deepening the natural channel of the stream. It was held to be an unlawful diversion. This comprises all the cases on the subject.

Excluding the cases in which the statement of the doctrine of absolute ownership is *dictum*, and looking to what has been actually decided, we have remaining only *Cross v. Kitts*, 69 Cal. 217,¹ holding that the owner of a mining claim, whose predecessor had granted a stream made up of percolating water collected by means of a tunnel, could not, even in the ordinary mining of his own land, interfere with the flow of the percolating water to the tunnel; *Southern Pacific K. R. Co. v. Dufour*, 95 Cal. 616, holding that a landowner can divert, for use on his own land, percolating water which feeds a spring rising on the land and flowing to an adjoining owner, although the diversion destroys the spring; *Bartlett v. O'Connor*, 36 Pac. (Cal.) 513, holding that such a diversion cannot be made in the process of draining the land for reclamation, where the draining and reclamation can be accomplished by another mode without diminishing the stream, and the mode used is adopted with the intention to injure the lower proprietor; and *Gould v. Eaton*, 111 Cal. 639,² declaring, in effect, that percolating water may be prevented from reaching a natural stream to the injury of a riparian owner, although the percolations are neither taken for use on the land where the diversion is made, nor in the use or reclamation of the land, but for use on other land distant from both the stream and the percolations. In view of this conflicting and uncertain condition of the authorities, it cannot be successfully claimed that the doctrine of absolute ownership is well established in this state. It is proper to state that in all the opinions which have so readily quoted and approved the supposed common-law rule, that injuries from interference with percolating waters were too obscure in origin and cause, too trifling in extent, and relatively of too little importance, as compared to mining industries and the wants of large cities, to justify or require the recognition

¹ 58 Am. Rep. 558.

² 52 Am. St. Rep. 201.

by the courts of any correlative rights in such waters, or the redress of such injuries, there has been no notice at all taken of the conditions existing here, so radically opposite to those prevailing where the doctrine arose. It is also to be observed that in some instances in the eastern states, mentioned in the former opinion in this case, the injustice from the diversion of percolating waters has been so glaring and so extensive that the court there was compelled to depart from its previously decided cases and recognize the rights of adjoining owners.

We do not see how the doctrine contended for by defendant could ever become a rule of property of any value. Its distinctive feature is the proposition that no property rights exist in such waters except while they remain in the soil of the landowner; that he has no right either to have them continue to pass into his land, as they would under natural conditions, or to prevent them from being drawn out of his land by an interference with natural conditions on neighboring land. Such right as he has is therefore one which he cannot protect or enforce by a resort to legal means, and one which he cannot depend on to continue permanently or for any definite period.

It is apparent that the parties who have asked for a reconsideration of this case, and other persons of the same class, if the rule for which they contend is the law, or no law, of the land, will be constantly threatened with danger of utter destruction of the valuable enterprises and systems of waterworks which they control, and that all new enterprises of the same sort will be subject to the same peril. They will have absolutely no protection in law against others having stronger pumps, deeper wells, or a more favorable situation, who can thereby take from them unlimited quantities of the water, reaching to the entire supply, and without regard to the place of use. We cannot perceive how a doctrine offering so little protection to the investments in and product of such enterprises, and offering so much temptation to others to capture the water on which they depend, can tend to promote developments in the future or preserve those already made, and, therefore, we do not believe that public policy or a regard for the general welfare demands the doctrine. An ordinary difference in the conditions would scarcely justify the refusal to adopt a rule of the common law, or one which has been so

generally supposed to exist; but where the differences are so radical as in this case, and would tend to cause so great a subversion of justice, a different rule is imperative.

The doctrine of reasonable use, on the other hand, affords some measure of protection to property now existing, and greater justification for the attempt to make new developments. It limits the right of others to such amount of water as may be necessary for some useful purpose in connection with the land from which it is taken. If, as is claimed in the argument, such water-bearing land is generally worthless except for the water which it contains, then the quality that could be used on the land would be nominal, and injunctions could not be obtained, or substantial damages awarded, against those who carry it to distant lands. So far as the active interference of others is concerned, therefore, the danger to such undertakings is much less. and the incentive to development much greater, from the doctrine of reasonable use than from the contrary rule. No doubt there will be inconvenience from attacks on the title to waters appropriated for use on distant lands made by persons who claim the right to the reasonable use of such waters on their own lands. Similar difficulties have arisen and now exist with respect to rights in surface streams, and must always be expected to attend claims to rights in a substance so movable as water. But the courts can protect this particular species of property in water as effectually as water-rights of any other description.

It may, indeed, become necessary to make new applications of old principles to the new conditions, and possibly to modify some existing rules, in their application to this class of property rights; and in view of the novelty of the doctrine, and the scope of argument, it is not out of place to indicate to some extent how it should be done, although otherwise it would not be necessary to the decision of the case. The controversies arising will naturally divide into classes.

There will be disputes between persons or corporations claiming rights to take such waters from the same strata or source for use on distant lands. There is no statute on this subject, as there now is concerning appropriations of surface streams, but the case is not without precedent. When the pioneers of 1849 reached this state they found no laws in force governing rights to take waters from surface streams

for use on non-riparian lands. Yet it was found 'hat the principles of the common law, although not previously applied to such cases, could be adapted thereto, and were sufficient to define and protect such rights under the new conditions. The same condition existed with respect to rights to mine on public land, and a similar solution was found. (*Kelly v. Natoma W. Co.*, 6 Cal. 108; *Conger v. Weaver*, 6 Cal. 557;¹ *Eddy v. Simpson*, 3 Cal. 253;² *Hill v. Newman*, 5 Cal. 446;³ *McDonald v. Bear River etc. Co.*, 13 Cal. 233.) The principles which, before the adoption of the Civil Code, were applied to protect appropriations and possessory rights in visible streams will, in general, be found applicable to such appropriations of percolating waters, either for public or private use, on distant lands, and will suffice for their protection as against other appropriators. Such rights are usufructuary only, and the first taker who with diligence puts the water in use will have the better right. And in ordinary cases of this character the law of prescriptive titles and rights and the statute of limitations will apply.

In controversies between an appropriator for use on distant land and those who own land overlying the water-bearing strata, there may be two classes of such landowners: those who have used the water on their land before the attempt to appropriate, and those who have not previously used it, but who claim the right afterwards to do so. Under the decision in this case the rights of the first class of landowners are paramount to that of one who takes the water to distant land; but the landowner's right extends only to the quantity of water that is necessary for use on his land, and the appropriator may take the surplus. As to those landowners who begin the use after the appropriation, and who, in order to obtain the water, must restrict or restrain the diversion to distant lands or places, it is perhaps best not to state a positive rule until a case arises. Such rights are limited at most to the quantity necessary for use, and the disputes will not be so serious as those between rival appropriators.

Disputes between overlying landowners, concerning water for use on the land, to which they have an equal right, in

¹ 65 Am. Dec. 528.² 63 Am. Dec. 140.³ 58 Am. Dec. 408.

cases where the supply is insufficient for all, are to be settled by giving to each a fair and just proportion. And here again we leave for future settlement the question as to the priority of rights between such owners who begin the use of the waters at different times. The parties interested in the question are not before us.

In addition, there are some general rules to be applied. In cases involving any class of rights in such waters, preliminary injunctions must be granted, if at all, only upon the clearest showing that there is imminent danger of irreparable and substantial injury, and that the diversion complained of is the real cause. Where the complainant has stood by while the development was made for public use, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it would affect his own water supply, the injunction should be refused and the party left to his action for such damages as he can prove. (*Fresno etc. Co. v. Southern Pacific Co.*, 135 Cal. 202; *Southern California Ry. Co. v. Slauson*, 138 Cal. 342.¹) If a party makes no use of the water on his own land, or elsewhere, he should not be allowed to enjoin its use by another who draws it out or intercepts it, or to whom it may go by percolation, although perhaps he may have the right to a decree settling his right to use it when necessary on his own land, if a proper case is made.

The objection that this rule of correlative rights will throw upon the court a duty impossible of performance, that of apportioning an insufficient supply of water among a large number of users, is largely conjectural. No doubt cases can be imagined where the task would be extremely difficult, but if the rule is the only just one, as we think has been shown, the difficulty in its application in extreme cases is not a sufficient reason for rejecting it and leaving property without any protection from the law.

It does not necessarily follow that a rule for the government of rights in percolating water must also be followed as to underground seepages or percolations of mineral oil. Oil is not extracted for use in agriculture, or upon the land from

¹94 Am. St. Rep. 58.

which it is taken, but solely for sale as an article of merchandise, and for use in commerce and manufactures. The conditions under which oil is found and taken from the earth in this state are in no important particulars different from those present in other countries where it is produced. There is no necessary parallel between the conditions respecting the use and development of water and those affecting the production of oil. Whether in a contest between two oil-producers concerning the drawing out by one of the oil from under the land of the other we should follow the rule adopted by the courts of other oil-producing states, or apply a rule better calculated to protect oil not actually developed, is a question not before us and which need not be considered.

With regard to the doctrine of reasonable use of percolating waters, we adhere to the views expressed in the former opinion.

The judgment of the court below is reversed and a new trial ordered.

McFarland, J., Van Dyke, J., Henshaw, J., Lorigan, J., and Beatty, C. J., concurred.

ANGELOTTI, J., concurring.—I concur in the judgment and in the views expressed in the opinion of Mr. Justice Temple on the former decision of this case as to the application of the doctrine of reasonable use to percolating waters. When properly applied, it appears clear to me that such doctrine will serve to protect the rights of the owner of realty rather than impair them.

I also concur generally in the views expressed by Mr. Justice Shaw in the majority opinion as to the same subject-matter, but several important questions are discussed that are not necessary to a decision of this case, and as to which the opinion herein cannot hereafter be considered as authority. As to such matters I refrain from expressing any opinion.

The following is the opinion of the court rendered in Bank on the former hearing, per Temple, J., November 7, 1902, referred to in the above opinion on rehearing:—

TEMPLE, J.—This appeal is taken from a judgment of nonsuit, entered against plaintiffs on motion of defendant.

The action was brought to enjoin defendant from drawing off and diverting water from an artesian belt, which is in part on or under the premises of plaintiffs, and to the water of which they have sunk wells, thereby causing the water to rise and flow upon the premises of plaintiffs, and which they aver had constantly so flowed for twenty years before the wrong complained of was committed by defendant. The water is necessary for domestic purposes and for irrigating the lands of plaintiffs, upon which there are growing trees, vines, shrubbery, and other plants, which are of great value to plaintiffs. All of said plants will perish, and plaintiffs will be greatly and irreparably injured if the defendant is allowed to divert the water.

These facts are admitted, and further, that defendant is diverting the water for sale, to be used on lands of others distant from the saturated belt from which the artesian water is derived.

The plaintiffs contend that this subsurface water constitutes an underground stream, and that plaintiffs are riparian thereto, and as such riparian owners they are seeking relief in this case.

The defendant denies that she is taking or diverting water from an underground stream or watercourse, and alleges that all the water which rises in the artesian wells on her premises, and which she is selling, is percolating water, and is parcel of her premises, and her property.

In effect, therefore, while denying that she is doing any act of which plaintiffs can complain, she really only denies that she is diverting water from an underground watercourse, and asserts her right to dispose of the water in the manner alleged, because it is percolating water, not confined to a definite watercourse.

The court sustained that proposition, and for that reason granted defendant's motion for nonsuit.

The so-called artesian belt includes several square miles of territory. It is a large accumulation of earth upon the base of very high mountains, and is composed of detritus of vary-

ing quantity and material with no regular stratification. Wells have been sunk at least to the depth of seven hundred and fifty feet, but no bed-rock has been found. It has quite an incline from the mountain, and is from seven hundred to fifteen hundred feet above sea-level. Mr. F. C. Finkle, a civil engineer, was the chief witness for the plaintiffs, and testified both as to facts palpable to the senses and as an expert. He says the saturated land is fed, first, by the underflow from the numerous ravines, canyons, and streams which enter the valley from the mountains; and secondly, by the rain and flood-water upon, and absorbed upon the slope and between the artesian belt and the mountains. This water percolating down into the soil, and constantly pressed forward by water accumulating, finally gets under partially impervious earth, where it is held under sufficient pressure to create the artesian belt. The banks of this supposed subsurface stream, the witness thought, were on the west, "a cemented dyke which runs through the valley, and the eastern boundary of it is the clay bank or dyke at the south side of the Santa Ana River." Within these limits many ravines enter from the mountains, some of them carrying at times great quantities of water, much of which had been appropriated and carried off in pipes or cemented aqueducts.

It is evident that if there is any flow to this underground body of water thus held under pressure, it is by percolation. The witness stated that the process was the same the world over. The lower lands are saturated from above. "It is done by saturation from the rainfalls and the floods, and percolation through voids in the soil."

It is quite manifest that this body (if it can be so styled) of percolating water cannot be called an underground water-course to which riparian rights can attach, unless we are prepared to abolish all distinction between percolating water and the water flowing in streams with known or ascertainable banks which confine the water to definite channels. All rain-water which falls upon the hills and mountain-sides which does not flow off at once as surface water is absorbed and percolates down in the same way to the valley below. No doubt limits can be found to every such flow, as in this case.

The distinction is well established, and, in some respects, different rules of law applied to the two cases. The plaintiffs, therefore, cannot establish their claims upon the theory of an underground watercourse to which they are riparian.

But appellants contend that though they are not riparian to an underground watercourse, and although the saturated belt carries only percolating water, still they are entitled to the injunction prayed for.

The defense, conceding that the water held in the earth is percolating water, relies upon certain decisions, which assert and apply literally the maxim, *Cujus et solum ejus est usque ad inferos*. And that water percolating in the ground or held there in saturation, belongs to the landowners as completely as do the rocks, ground, and other material of which the land is composed, and therefore he may remove it and sell it, or do what he pleases with it. He cites as authority for the proposition, *Hanson v. McCue*, 42 Cal. 303;¹ *Southern Pacific R. R. Co. v. Dufour*, 95 Cal. 616; *Gould v. Eaton* 111 Cal. 641;² and *City of Los Angeles v. Pomeroy*, 124 Cal. 597.

It is obvious at once that the analogy between the right to remove sand and gravel from the land for sale and to remove and sell percolating water is not perfect. If we suppose a saturated plain, one may remove and sell the sand and gravel from his land without affecting or diminishing the sand and gravel on the lands of his neighbors. If the water on his lands is his property, then the water in the soil of his neighbors is their property. But when he drains out and sells the water on his land, he draws to his land, and also sells, water which is the property of his neighbor. And the effect is similar in other respects. By pumping out the water from his lands he can perhaps deprive his neighbors of water for domestic uses, and, in fact, render their land valueless. In short, the members of the community, in the case supposed, have a common interest in the water. It is necessary for all, and it is an anomaly in the law if one person can for his individual profit destroy the community and render the neighborhood uninhabitable.

¹ 110 Am. Rep. 299.

² 53 Am. St. Rep. 201.

We have derived our law, in respect to subterranean waters, as in other respects, mostly from England, but in regard to this matter the first cases are quite modern. Even yet the text-books on water-rights have but little to say upon the subject of percolating water. Such law as has been made upon the subject comes from countries and climates where water is abundant, and its conservation and economical use of little consequence as compared with a climate like southern California. The learned counsel for appellants state in their brief that water at San Bernardino is worth one thousand dollars per inch of flow. Percolating water, or water held in the earth, is the main source of supply for domestic uses, and for irrigation, without which most lands are unproductive. It is also stated that speculators are seeking to appropriate the percolating water, by getting title to some part of a watershed or slope, and by running canals and tunnels, and by sinking, to obtain water for sale. It is asserted that the lands naturally made moist by percolating water are very productive, and were first settled upon, and have been most highly improved; and he asks whether these lands are to be converted into deserts because speculators may pump and carry away to some distant locality the subsurface waters which rendered the land fertile. Certainly no such case as this has come before a court, or could well exist in England, or in the eastern states.

It is often asserted that *Acton v. Blundell*, 12 Mees. & W. 324, decided in Exchequer Chamber, in 1843, was the first case in England in regard to percolating water. This shows how unimportant, relatively, the subject is in England. It was an action for damages occasioned by working a coal-mine on adjoining land, which interfered with water which was flowing underground to plaintiff's spring. The court instructed the jury, "that if the defendants had proceeded and acted in the usual and proper manner in the land for the purpose of working and mining a coal-mine therein, they might lawfully do so." This instruction was held to be correct, and that is the real force and effect of the decision. But the chief justice pointed out some respects in which the right to water flowing in an open visible stream differs from an underground

flow by percolation. The main difference, so far as concerns the question under consideration, was, that percolation was occult, the regulation of which was a difficult matter. One who disturbed the course of percolating water by digging upon his own land could not tell whether he would drain his neighbor's well, nor could the person injured demonstrate that such was the cause of the injury. So, too, when one diverts water from a visible stream, the fact and the effect are at once known, while as to percolating water its course may be obstructed or changed without the intent to do so, and without knowing that such would be the effect of what was done. His lordship, the case being one of first impression, quotes a passage from a civil-law writer to the effect that when one digging upon his own land drains his neighbor's well, such neighbor has no cause of action: *Si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit*. His lordship, however, although the case did not require it, disregarded the qualifications found in the civil law, and held that the case was not governed by law which applies to flowing streams, "but that it rather falls within that principle which gives to the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or pervious ground, or venous earth, or part soil and part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of this right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action."

This statement has been frequently quoted, both in England and in this country, and has been generally adopted as a correct statement of the law upon the subject. In *Acton v. Blundell*, 12 Mees. & W. 324, as has been said, the working of a mine upon an adjoining estate drained certain springs on plaintiff's land. It would have been sufficient to defeat plaintiff's action to have said that the working of a coal-mine in a proper manner is a reasonable use of land, and that it

was without malice or an intent to injure plaintiff. It is a general rule—in fact a universal principal of law—that one may make reasonable use of his own property, although such use results in injury to another. But the maxim, *Cujus est solum, ejus est usque ad inferos*, furnishes a rule of easy application, and saves a world of judicial worry in many cases. And perhaps in England and in our eastern states a more thorough and minute consideration of the equities of parties may not often be required. The case is very different, however, in an arid country like southern California, where the relative importance of percolating water and water flowing in definite watercourses is greatly changed.

And it seems to me a great mistake is made in supposing that if the plenary property of a landowner in percolating water is denied, the alternative is to apply to such water all the rules which apply to the use of water flowing in watercourses having defined channels. The entire argument for what may be called the *cujus est solum* doctrine consists in showing that some recognized regulation of riparian rights would be inapplicable. It is said, for instance, that the law of riparian rights requires each proprietor to permit the water to flow as it was accustomed to flow. Apply this rule to subsurface water, and no one could drain his land, for he thereby prevents the water from flowing as it was accustomed to flow by percolation to his neighbor. The common-law method in the supposed case would be to apply the principle to the new case, although some judge-made rule as to how it shall be applied might stand in the way. The principle is clearly applicable. A riparian owner may not divert the water because he would thereby injure his neighbors who have equal rights in the stream. Still he may take a reasonable amount from the stream for domestic purposes, and that may equal the entire flow, although he thereby injures his neighbors. It is a question of reasonable use and that applies both to the land of the person disturbing the percolation and to adjoining land. He may cultivate his land, and for that purpose ordinarily may drain it, and plow it, or clear it from forests, although all these operations may affect the flow of water to

the lower proprietor, both in the watercourse and by percolation. He was allowed to become the owner for those purposes, and with the understanding that all other proprietors have the same right to use their land. The maxim, *Sic utere*, etc., plainly applies as between such proprietors, very much as it does between different riparian proprietors upon the same stream.

The title to all land is held subject to this maxim. Such ownership is "but an aggregation of qualified principles the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations necessary for the highest use of land by the entire community of proprietors." (*Thompson v. Androscoggin etc. Co.*, 54 N. H. 545.)

Proprietary rights are limited by the common interests of others,—that is, to a reasonable use,—and such use one may make of his land, though it injures others. This proposition is generally recognized, but for some reason has not always been recognized by the courts when considering the subject of percolating water, although all rights in respect to water are peculiarly within its province.

This rule of reasonable use answers most effectually the main argument against recognizing any modification of the *cujus est solum* doctrine as applied to percolating water, although in a majority of the cases which are claimed as authority against the rule of reasonable use the court takes pains to note that the act which disturbs the percolating water was in using the land in the usual manner and without the intent of injuring a neighbor.

Among the English cases, *Chasemore v. Richards* was most carefully considered. The village of Croydon was situated upon an extensive plain near the head-waters of the river Waundale, and a goodly portion of the permanent flow of the river came by percolation from this plain.

The village had caused a large well to be dug about a quarter of a mile from the river, and was pumping from it five or six hundred thousand gallons of water daily for the use of the town. Plaintiff was a riparian proprietor upon the river below, and had a mill which was operated by the waters of the river. The pumping naturally diminished the flow

and prevented the use of the mill as efficiently as before. All the facts were admitted or found to exist.

The case was first decided in Exchequer Chambers in favor of the defendant, Mr. Justice Coleridge dissenting. (2 Hurl. & N. 168.) The dissenting opinion presents the doctrine of reasonable use.

The case was taken to the House of Lords. (7 H. L. Cas. 349.) There the case was most elaborately and ably argued, and the view in regard to reasonable use was fully presented. A case was made and the opinion of the judges was solicited. The judges held unanimously for the defendant, sustaining fully the *cujus est solum* doctrine without qualification, and this was affirmed by the house. The matter mainly discussed, however, was the plaintiff's claim that he had a prescriptive right to the water. The court held that riparian rights are not derived by prescription, but the right to the water is *ex jure naturae*. This settled the main contention, and little more was said, except to refer to the cases in which the rights to percolating waters are discussed. Lord Wensleydale, however, who had doubts, pronounced an opinion which seems to me in accord with the views I am trying to express.

The doctrine of reasonable use has been recognized in many cases in the United States,—impliedly in most, as I have stated, but expressly in some.

Wheatley v. Baugh, 25 Pa. St. 528,¹ is one of these, and is remarkable in that the court states as strongly as possible, and with approbation, the *cujus est solum* doctrine. It is even said that the opposite doctrine (applying to such water the rule as to riparian rights) would amount to total abrogation of the rights of property. It is said one could not clear or cultivate his land or build a house without interfering with percolating water; and even if rights were admitted to exist, the difficulty of enforcing them would be insurmountable. I think I have shown that the admitted right to a reasonable use of the land and of the water answers all these objections. To my mind this is so obvious that I can but wonder that such objections have ever troubled the judiciary. And yet, notwithstanding this insistence upon the rule

¹ 64 Am. Dec. 721, and note.

which apparently ignores all equities of others than the owner of the soil in which the water is found, the court felt obliged to, and did, in unequivocal words, declare that the use of it must be reasonable. The proprietor may make a reasonable use of his own land, although in so doing he obstructs or changes the percolation of water to or from his neighbor's land.

But by far the most satisfactory case upon the subject is *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569.¹ That was a most elaborately considered case, and this precise question is discussed with a fullness and ability which I am not so vain as to think I could improve upon. I would like to transcribe the entire argument, but as it is accessible to the profession, I need only say I adopt it in full. The decision was approved in *Swett v. Cutts*, 50 N. H. 439.²

Smith v. City of Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141, was in some ways a counterpart of *Chasemore v. Richards*. The city of Brooklyn constructed in Queens County culverts, aqueducts, reservoirs, and conduits, and dug deep trenches to intercept percolating waters, and further sunk in the process earth-wells, and put in pumps to obtain the water with which the soil, which it owned, was saturated. It thus procured for the use of the city a large amount of water. Plaintiff owned a farm distant from these water-works about twenty-four hundred feet. Upon the land was a small brook, in which he had placed a dam, which he used for purposes of boat-building and for cutting ice. The brook had carried water all the year round. The operations of the defendant rendered this brook entirely dry, and deprived the plaintiff of his income.

Here is a case like that of the village of Croydon. Defendant intercepted percolating water upon its own land before it had reached a watercourse. It did not drain water from a defined stream, but the water was prevented from reaching the stream, which was thereby as effectually destroyed as it could have been by draining the water from it.

Judge Hatch, who wrote the opinion in the appellate division of the supreme court, begins by quoting the prevailing doctrine in regard to percolating water, from *Pixley v.*

¹ 82 Am. Dec. 179.

² 9 Am. Rep. 276, and note.

Clark, 35 N. Y. 520:¹ "An owner of the soil may divert percolating water, consume or cut it off with impunity. It is the same as land, and cannot be distinguished in law from land." He says this proposition must be admitted, but nevertheless a case cannot be found in this country "where the right has been upheld in the owner of land to destroy a stream, a spring, or a well upon his neighbor's land, by cutting off the source of its supply, *except it was done in the exercise of a legal right to improve the land, or make some use of it in connection with the enjoyment of the land itself.*" I have italicized the last clause, as it contains the qualification found in the civil law, upon which the English rule is professedly based, and expresses the principle for which I contend. The learned judge admits that the English cases go further, but says that the American cases have not gone further.

The learned court gives a concise statement of the reasons given by the English courts for not applying to percolating water the same principle which governs the right of riparian proprietors, and agrees with Justice Coleridge and Lord Wensleydale that they are insufficient. The court recognized the right of the landowner to percolating water, but says the right must be exercised with reference to the equal right of others in their land. He says one may as well claim the right to tunnel into his neighbor's land and take out valuable minerals, as to drain from it water which is also parcel of it, for sale. The peculiar nature of the property which enables one to take it by drainage does not justify the taking save in the usual and reasonable use of his own land,—in other words, for the proper use and betterment of his own property.

Allusion is made in the opinion to the rule, inconsistent with the *cujus est solum* doctrine, that you cannot do anything on your land which will drain water from a visible stream or natural pond upon the land of another. In *Canal Co. v. Shugaer*, L. R. 6 Ch. App. Cas. 483, Lord Hatherley said: "You have a right to all the water which you can draw from the different sources which may percolate underground; but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you cannot get at the underground water without touching the water in a defined surface channel, I

think you cannot get at it at all." It is well said that this decision cannot stand with *Chasemore v. Richards*, even though the court may say that it can.

If a landowner owns the water percolating in his soil, as he does the rock, minerals, and earth, why may he not take it in such a case? And what difference is there in destroying a stream or natural pond by drawing water from it through percolation or by preventing it from flowing into the stream? The effect is the same, and knowledge of the inevitable effect of the act is the same. And this rule would prevent a landowner from draining a marsh, or even from clearing or cultivating his land, when these operations would tend to increase the percolation from a stream or natural pond upon a neighbor's land. This is one of the main arguments in support of the doctrine of *Acton v. Blundell*, 12 Mees & W. 324. It seems here strangely to lose its force, as does also another reason for that rule, that when doing such acts the landowner could not reasonably anticipate the injury as probable.

The court expressly applies the doctrine *sic utere tuo* to the case and affirms the judgment against the city.

In the appellate court this judgment was affirmed. (*Smith v. City of Brooklyn*, 160 N. Y. 357.) It is there treated, however, as a draining of water from plaintiff's brook and pond. Judge Hatch, in the supreme court, expressly states that defendant simply prevented the water from reaching the brook on plaintiff's farm. Perhaps either view may be taken of the facts. There was an immense saturated plain composed of porous earth. Defendant's wells extended lower down than the bottom of the pond. The stream and pond, and all the springs, wells, and streams in the neighborhood, have been dry ever since the operations of the defendant. Since the water was first drained out, surely there has been no percolation from the stream. This circumstance makes the case more like that in hand. Here was a vast quantity of water held in the soil, which constituted the common supply of many people. The defendant, pumping from wells on its own land, and taking only percolating water, exhausted this common supply. The court held that it could not be. The reasons would have been much more forceful had the case risen in an arid climate like San Bernardino.

But this question was completely put at rest, so far as the state of New York is concerned, by the case of *Forbell v. City of New York*, 164 N. Y. 522.¹ It was a suit by another plaintiff to restrain the same operations considered in *Smith v. City of Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 141. Here there was no visible stream or pond on plaintiff's land. His injury was merely that the level of the water held in the soil was lowered to his injury. In stating the case the court said: "The city makes merchandise of the large quantities of water which it draws from the wells that it has sunk on its two acres of land. The plaintiff does not complain that any surface stream or pond or body of water upon his land is thereby affected, but does complain and the courts below have found that the defendant exhausts his land of its accustomed and natural supply of underground or subsurface water, and thus prevents him from growing upon it the crops to which the land was and is peculiarly adapted, or destroys such crops after they are grown or partly grown." This statement shows a striking similarity of the issues made in that case to those involved here.

The court proceeds to state the usual doctrine in regard to percolating water and approves the doctrine for the cases in which it is properly applicable. No doubt the land proprietor owns the water which is parcel of his land, and may use it as he pleases, regard being had to the rights of others. It is not unreasonable that he should dig wells in order to have the fullest enjoyment and usefulness of his estate, or for pleasure, trade, or whatever else the land as land may serve. "But to fit it up with wells and pumps of such persuasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendants and its customers, unreasonable as to the plaintiff, and others whose lands are thus clandestinely sapped and their value impaired."

Counsel for the plaintiff in that case contended that since plaintiff owned the percolating water in his own soil, the unlawful draining of it away by the defendant was a trespass committed on his land. This contention was sustained, both

¹ 79 Am. St. Rep. 666.

in the supreme court and in the court of appeals. The court further indorsed the opinion of Judge Hatch in *Smith v. City of Brooklyn*, from which I have made quotations.

If the principle announced in these cases prevails here, the order granting a nonsuit and the judgment entered thereon must be reversed. It does not require a reversal of the rule laid down in *Acton v. Blundell*, which has been so often cited and indorsed, but only a holding that in certain cases there should be added the element of reasonable use, having reference both to the land belonging to the party who has disturbed the movement of percolating water and to adjoining land, and to land sensibly affected by such acts. Whatever the English rule may be the American cases either recognize the application of the rule of *sic utere tuo* to the subject, or they are cases in which it was wholly unnecessary to consider that subject. Such are the California cases. In the case of *City of Los Angeles v. Pomeroy*, 124 Cal. 597, the question might have been raised, and in the trial court, it may be, was, and in some of the instructions the rule laid down in *Acton v. Blundell* is asserted without qualification. Still this court was not called upon, and did not consider any such question. I think it clear that the American cases do not require us to hold that the maxim *sic utere tuo* does not limit the right of the landowner to the use of the subsurface water, but on the contrary all the cases in which the question has been discussed held, or admit, that such maxim should limit such right where justice requires it. Such, I think, is the proper rule.

It follows that the court erred in granting the nonsuit, and the judgment is therefore reversed and a new trial ordered.

Beatty, C. J., McFarland, J., Van Dyke, J., Harrison, J., and Henshaw, J., concurred.

Rehearing denied.

[L. A. No. 1360. In Bank.—November 28, 1903.]

**JENNIE VINSON et al., Respondents, v. LOS ANGELES
PACIFIC RAILROAD COMPANY, Appellant.**

APPEAL FROM JUDGMENT—MOTION TO DISMISS—FAILURE TO FILE TRANSCRIPT—SETTLEMENT OF STATEMENT—MOTION FOR NEW TRIAL UPON MINUTES.—A motion to dismiss an appeal from the judgment for failure to file the transcript will be denied, though more than forty days have elapsed after the perfecting of the appeal, where the transcript was filed within forty days after the settlement of a statement on motion for a new trial made upon the minutes of the court, notwithstanding more than sixty days had elapsed after the entry of the order denying the new trial, before the statement was settled, and no appeal was taken from the order.

ID.—INDEPENDENT RIGHTS OF APPEAL—USE OF SETTLED STATEMENT.—The right of a litigant to appeal from the judgment, and his right to appeal from an order refusing a new trial, are distinct and separate rights. A party appealing from the judgment has an independent right under section 950 of the Code of Civil Procedure, to have settled a statement of the case to be used upon such appeal, which is not limited by the existence of an appeal or right of appeal from the order refusing a new trial.

MOTION to dismiss an appeal from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

John D. Pope, for Appellant; Bigelow & Dorsey, *Amici Curiae*, also for Appellant.

Waters & Wylie, for Respondents.

HENSHAW, J.—This is a motion by the plaintiffs to dismiss the defendant's appeal from the judgment of the trial court. In Department the motion was granted, and the appeal was dismissed. Upon petition a reconsideration by the court in Bank of the question involved was ordered. The facts are accurately stated in the Department opinion, and are as follows: The ground of the motion is, that the transcript was not filed within forty days after the appeal was perfected. Rule II of this court provides that: "The appellant in a civil

action shall, within forty days after the appeal is perfected and the bill of exceptions and the statement (if there be any) are settled, serve and file the printed transcript of the record." The judgment was rendered in the court below on May 15, 1902, and the appeal was perfected on November 17, 1902. It is conceded that if the time for filing the transcript began to run on November 17th, the appeal must be dismissed for failure to file the same within time. But the appellant claims that the time had been extended by the pendency of proceedings to settle a statement on motion for a new trial, and this presents the sole question in the case. The notice of the motion to dismiss was served and filed on January 10, 1903. It is claimed that a statement on motion for a new trial was settled on December 16, 1902, and that within forty days after that date, but after the filing of the notice of motion to dismiss, the transcript on appeal was filed. If the statement so settled was settled under authority of law and can be used on the appeal, the motion must be denied.

The motion for new trial was made on the minutes of the court, and was denied in the court below on July 21, 1902. No appeal was ever taken from the order. The respondents contend that after the lapse of sixty days from the entry of the order, without the taking of an appeal, the right to have a statement settled upon the motion ceased, that the subsequent settlement of the so-called statement was a mere idle and useless ceremony, and that the statement so settled is without force or effect. The appellant relies on section 950 of the Code of Civil Procedure, which is as follows: "On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll, and of any bill of exceptions or statement in the case, upon which the appellant relies. Any statement used on motion for a new trial, or settled after decision of such motion, when the motion is made upon the minutes of the court, as provided in section 661, or any bill of exceptions settled, as provided in sections 649 or 650, or used on motion for a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing the new trial." The contention of the appellant is, that the effect of this section is to give the party who intends to appeal from a judgment an independent right to have settled a statement of the case for use upon such an appeal, and that

by virtue of its provisions he is not limited to the use of such statements only as have been regularly and legally settled in the course of some proceeding upon motion for a new trial.

We think the appellant's contention is sound and should be sustained. In Department it was held that, because the moving party had lost by lapse of time his right to appeal from the order refusing his motion for a new trial, the trial court could not be compelled to settle the statement, and that any statement which the court might settle under such circumstances would be void and would be stricken from the files. This would be quite true if the right of the appellant to the statement was absolutely limited by his right to appeal from the order, or if, in other words, as the Department opinion held, he must appeal from the order before he can exercise the right to use the statement upon his appeal from the judgment. We think, however, that this conclusion is erroneous; that it imposes onerous conditions upon the unfortunate litigant who moves for a new trial upon the minutes of the court—a practice which by this court has been commended (*Malcolmson v. Harris*, 90 Cal. 262)—which are not brought to bear upon the litigant who moves for a new trial in any other way. We think, moreover, that the conclusion is in hostility to the spirit of simplicity in practice, pleading, and procedure which animates our code system. To illustrate: If the motion for a new trial be made upon the bill of exceptions or upon the statement (Code Civ. Proc., sec. 659, subds. 2, 3), it is not necessary that the moving party should appeal from the order denying him a new trial as a condition to his right to use the bill of exceptions or the statement, upon appeal from the judgment, and no sound reason can be discovered to lead to the view that the legislature meant to make a distinction between those cases and that where the motion has been made upon the minutes of the court. Nor does it seem a satisfactory answer to say that the appellant in this case cannot have any statement prepared because he could not use the statement upon appeal from the order denying him a new trial. The law might require the trial court to settle such a statement without regard to the taking of an appeal from the order denying the new trial, the statement to be used upon appeal from the judgment, and we think

a consideration of the code sections will disclose that the law contemplates that the trial judge should do precisely this thing.

It is to be remembered that a litigant's right to appeal from the judgment and his right to appeal from the order refusing him a new trial are distinct and separate rights. He may waive either and rely upon the other. It is recognized that some, though not all, of the propositions which may be advanced upon motion for a new trial may likewise be urged upon appeal from the judgment. The litigant who has failed in his motion for a new trial may conclude that all of the propositions which he desires to argue to the appellate court can be presented upon appeal from the judgment with the accompanying papers which the law allows upon such appeal. He may decide as matter of economy to avoid the expense of two appeals, or he may take his appeal from the judgment alone, under the conviction that the trial court was correct in its rulings as to such matters as can be raised only upon motion for a new trial, and hence that the appeal from the judgment affords him a complete remedy. Therefore, to say that because he has not prosecuted an appeal from the order refusing him a new trial, he must lose his right to present those points which arise upon his motion for a new trial, but which at the same time are proper to be presented upon his appeal from the judgment, is a construction so harsh as to be justified only by the express mandate of the law. Or it may be put in another way: Why should a litigant be compelled to take the useless and expensive procedure of perfecting an appeal which he does not care to prosecute, in order to preserve rights which the law accords him upon appeal from the judgment alone? And that the law does accord him these rights we think manifest from a reading of section 950 of the Code of Civil Procedure. The first sentence of that section is mandatory, and declares that on an appeal from a final judgment the appellant must furnish this court with a copy of a bill of exceptions or statement of the case upon which he relies. And any statement settled after a decision of a motion for a new trial, when the motion is made upon the minutes of the court, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial. There is in this no word as to

the necessity of taking an appeal from the order denying the new trial as a prerequisite to the right to employ the statement on appeal from the judgment. It is a declaration, first, that the party appealing from the judgment has the right to use a statement settled after a decision upon his motion for a new trial upon appeal from the judgment, coupled with the mandatory provision that he must present such a statement to this court. These being his correlative rights and duties, it seems plain that he may demand of the trial court the settlement of a proper statement, not to be used upon an appeal from the order denying him a new trial, but to be used upon his appeal from the judgment which he has already taken, because the law says that he may so use it, and further says that he must present it to this court if it contains any propositions upon which he relies for a reversal.

And this will be found strictly within the reasoning of this court in *Wall v. Mines*, 128 Cal. 136, and in *Kelly v. Ning Yung etc. Assn.*, 138 Cal. 602. Of course it would be a vain thing to compel the trial court to settle such a statement if its only purpose was to be used upon appeal from the order denying a new trial, because the right to appeal from that order has been lost, but it is far from being a vain thing in the contemplation of the law as above set forth that the appellant from the judgment has the right to use such a statement upon appeal from the judgment, and must present it to this court upon such appeal.

We conclude, therefore, that under the circumstances here set forth a litigant moving for a new trial on the minutes of the court, has the independent right to enforce the settlement of a statement after motion denied (even though he does not appeal from that order), and to use it upon his appeal from the judgment.

The motion to dismiss is therefore denied.

Beatty, C. J., Lorigan, J., and Van Dyke, J., concurred.

[L. A. No. 1182. In Bank.—November 28, 1903.]

SARAH C. CUMMINGS, Appellant, v. W. R. KEARNEY,
City Treasurer of Santa Barbara, and U. YNDART, Re-
spondents.

ORDER DENYING NEW TRIAL—REVIEW UPON APPEAL.—Upon appeal from an order denying a new trial, without an appeal from the judgment, the sufficiency of the pleadings and of the judgment, as being the legal conclusion from the facts found, cannot be questioned.

ID.—STREET IMPROVEMENT—SALE UNDER BOND—INJUNCTION—FINDING—WAIVER OF OBJECTION—ESTOPPEL.—Upon appeal from an order denying a new trial, in an action to enjoin the sale of plaintiff's lot under a bond for a street improvement, a finding sustained by the evidence that plaintiff and her predecessor in title, by their conduct, waived objection to the improvement, and acquiesced therein and received the benefit thereof, and consented to and ratified the proceedings, and took no appeal to the city council, and did not object to the bond, nor pay or offer to pay the assessment or bond, or any part thereof, and that plaintiff is estopped by said conduct from obtaining equitable relief, is conclusive of the case.

ID.—REQUEST FOR IMPROVEMENT AND ASSESSMENT—FRAUD UPON BOND OWNER.—Where it appears that plaintiff's predecessor in title requested the improvement, and requested the superintendent of streets to deliver the assessment and diagram upon the faith of which the work was done, and acquiesced in all the proceedings without objection to any step, his acts and conduct, if allowed to be questioned, would work a fraud upon the owner of the bond which the law will not tolerate.

APPEAL from an order of the Superior Court of Santa Barbara County denying a new trial. W. S. Day, Judge.

The facts are stated in the opinion.

B. F. Thomas, for Appellant.

Thomas McNulta, and Richards & Carrier, for Respondents.

COOPER, C.—This action was brought to enjoin the threatened sale of plaintiff's lot in the city of Santa Barbara for the amount due upon a bond owned by defendant Yndart, which was issued for street-work and improvements upon the

lot now owned by plaintiff. Findings were filed, upon which judgment was entered for defendants. Plaintiff made a motion for a new trial, and this appeal is from the order denying said motion.

As no appeal has been taken from the judgment, the sufficiency of the pleadings and of the judgment as being the legal conclusion from the facts found, cannot be questioned on this record.

The plaintiff's counsel has devoted much of his brief to a discussion of certain alleged irregularities and defects in the assessment, specifications, and contract under which the work was done. From the view we take of the case, it is not necessary to examine nor discuss the regularity of the proceedings by which the lien was created and the bond issued. The property belonged to L. C. Cummings, the husband and predecessor in interest of plaintiff, at all times during the preliminary proceedings leading up to the improvements and issuance of the bond.

The court found: "That plaintiff by the conduct of herself and her predecessor waived any objection to the proceedings connected with said improvement and consented to and accepted and ratified said proceedings, and acquiesced in said improvements and received the benefit thereof, and the benefit received from the issuance of said bond; that plaintiff did not nor did her predecessor appeal to the said council at any time concerning the irregularity or invalidity of any of the proceedings, or in reference to any of the work performed, nor did either of them notify said city treasurer before the issuance of the bond referred to in the complaint, that it was her or his desire that no bond be issued, and the plaintiff has never paid or offered to pay the amount of such assessment or bond or any part thereof, and plaintiff is estopped by reason of said conduct from obtaining any equitable relief from this court in the premises, and no part of said assessment or bond has been paid by any person."

The above finding, so far as it is a finding of facts, and so far as it contains conclusions of law, is supported by the evidence and the probative findings and is conclusive of the case.

There is evidence to show that on the thirtieth day of

September, 1893, the owners of the abutting lots on the street where the improvements were to be made entered into a written contract with one Long, the superintendent of streets, which contract recited the fact that a contract for doing the proposed work had been awarded by the city council to one Newberry; that notice of the award of said contract had been duly published and posted according to law; that the owners had elected to take the said work, and that the time for doing it had not expired. The contract further provided that the said owners should do the work so awarded to Newberry, and contained stipulations as to the specifications and manner in which the work should be done; that upon its completion the superintendent of streets should duly make and issue an assessment and diagram and attach a warrant thereto as provided by law; that the city of Santa Barbara should not be liable for any of the costs of the work. This contract was signed by the property-owners and by plaintiff's predecessor as follows: "L. C. Cummings, by B. F. Thomas, agent." Thomas is the attorney for plaintiff, and was then the attorney for her husband, and his authority for signing the contract was a telegram from Portland, Maine, dated September 29, 1893, as follows: "To B. F. Thomas. I hereby authorize you, as agent, to sign paper contract for street work. Lincoln C. Cummings." The contract contained the proper affidavit that the parties whose signatures were attached were the owners or agents of the owners, and that the frontage set forth in the contract was correct. This affidavit was signed "L. C. Cummings. (Agent) B. F. Thomas." A proper bond was given to the effect that the owners and parties to the contract would faithfully perform the work, which bond was signed in the same manner, "L. C. Cummings. B. F. Thomas, agent." The bond was duly approved. A proper assessment was made, showing in detail the cost of the work, and fixing the rate per front foot. A warrant, certificate of the city engineer, and diagram were made. The warrant stated that serial bonds would be issued to represent the cost of the work, in manner as provided by law, giving the rate of interest, the time they were to run, and a notice that a bond would issue to represent each assessment of fifty dollars or more. This assessment certificate and diagram were duly recorded February 7, 1894. The following instrument

in writing was then made by the property-owners, to wit: "We, the undersigned property-owners on De la Vina Street, between Micheltorena and Islay streets, who entered into the contract for grading, etc., and sewerage said portion of De la Vina Street, hereby authorize the superintendent of streets of the city of Santa Barbara to issue and deliver to O. W. Boeseke the assessment and diagram for said work." This authorization was duly signed by the owners and by "L. C. Cummings, by B. F. Thomas, agent."

O. W. Boeseke made the proper affidavit to the contractor's return, showing demand and receipt of payment of portions of the assessment, and that the assessment involved in this action was unpaid as follows: "No. 3. Demand made upon as owners, unknown owner, No. 3. March 7th, 1894, assessment due and unpaid, \$473.45."

The above certificate was made at the close of the work. It was here admitted: "That on the twentieth day of March, 1894, the superintendent of streets certified by written instrument to the city treasurer of the city of Santa Barbara a complete list of all assessments which remained unpaid, which amounted to fifty dollars or over upon the assessment and diagram issued for the work of said improvement (being the improvement in question here), upon the lot owned by the plaintiff and amount of assessment unpaid thereon, to wit, \$473.45; that plaintiff did not, nor did her predecessor, appeal to the city council at any time concerning the irregularity or invalidity of any of the proceedings had in reference to any work performed, nor did either of them notify said city treasurer before the issue of the bond referred to in the complaint that it was her or his desire that no bond be issued; that plaintiff has never paid or offered to pay the amount of such assessment or bond or any part thereof."

It does not appear at what time plaintiff became the owner of the lot, but it seems to be conceded that it was after all the proceedings to which her predecessor in title assented. The action was commenced in August, 1899. It appears clear to us that upon the plainest principles of honesty and fair dealing the plaintiff is estopped by the conduct of her predecessor in title from questioning the validity of the bond for any irregularity in the preliminary proceedings.

L. C. Cummings was a party to the contract and subsequent proceedings. At his request the improvements were made. He received, or is presumed to have received, the benefit of the money expended. He made no appeal to the city council, nor in any way made known his objection to any step in the proceedings. He requested the superintendent of streets to deliver to Boeseke the assessment and diagram upon the faith of which the work was done. His acts and conduct, if allowed now to be questioned, would work a fraud upon the owner of the bond. "Where a man has been silent when in conscience he ought to have spoken he will not be allowed to speak when conscience requires him to be silent." His silence was not the only culpable thing, but the direct acts and requests evidenced by the writings herein set forth. The case of *Callender v. Patterson*, 66 Cal. 357, is directly in point. It was there said: "A party cannot for value assign a contract and assessment and then set up the defense that they are invalid because not in compliance with the street law. The law does not tolerate such a procedure."

The views herein expressed are not in conflict with *Union Pav. etc. Co. v. McGovern*, 127 Cal. 638. In that case the work had not been done. The court said: "In the agreement between Tucker and the property-owners they do not purport to assign to him an assessment for work that had already been done for them, or any existing obligation in their favor from which a warranty of its validity might be implied; they merely agreed to assign a contract not yet entered into." If the contract under which the work was done authorized the contractor to recover the money, the law authorized the issuance of the bond. The holder of the bond paid the money upon the faith of the prior transactions and is entitled to be protected by them.

We advise that the order be affirmed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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| McFarland, J., | Van Dyke, J., | Shaw, J., |
| Angellotti, J., | Lorigan, J., | Hienshaw, J. |

[L. A. No. 1037. In Bank.—November 28, 1903.]

C. E. SWIFT et al., Appellants, v. OCCIDENTAL MINING AND PETROLEUM COMPANY, and J. J. HIGH, Respondents.

ORDER DENYING NEW TRIAL—REVIEW UPON APPEAL.—Upon appeal from an order denying a new trial, this court is limited in its review to the grounds upon which the new trial was asked, and cannot review the sufficiency of the pleadings or findings to support the judgment, or consider any errors in the conclusions of law or in the judgment.

ID.—DECISION AGAINST LAW—GROUND FOR NEW TRIAL.—A motion for new trial on the ground that the "decision is against law," is only permissible when a new trial is the appropriate means of correcting the error in the decision, as where omitted findings upon material issues are essential to be made. It cannot be made to correct any conclusion of law from the findings, or any decision against law, for the correction of which a new trial would be vain or useless.

ID.—SPECIFICATIONS OF INSUFFICIENCY OF EVIDENCE—OBJECT OF RULE.—Specifications of the insufficiency of the evidence to sustain the findings, which clearly designate the findings and parts of findings, which it is claimed the evidence does not justify, are not objectionable. The object of the rule requiring these specifications is to shorten the statement by excluding everything irrelevant to the specified fact, and to notify the opposing party of the particular finding called in question, that he may see that the statement fairly and fully presents the evidence bearing on that particular matter; and this object accomplished, the statute is satisfied.

ID.—EJECTMENT—CROSS-COMPLAINT—OIL LEASE—RIGHT OF RENEWAL—BREACH OF CONDITIONS—FINDINGS AGAINST EVIDENCE.—In an action of ejectment, where the defendant set up by way of cross-complaint a right of renewal of a lease of oil-land from the plaintiff, which made a renewal of the lease depend upon the performance of conditions, which the court found, generally and specifically, had been complied with, whereas the evidence clearly showed a breach of the conditions, an order denying a new trial must be reversed for insufficiency of the evidence to sustain the findings.

ID.—EVIDENCE—USE OF OIL FOR FUEL—CUSTOM—PRACTICAL CONSTRUCTION OF LEASE.—Where the terms of the lease were not clear as to the right of the lessee to use oil for fuel, though evidence of a custom to that effect among oil prospectors was not admissible, evidence was admissible to show that the plaintiffs acquiesced in the burning of oil in the work of development, and made no demand on account of the oil so used; and such evidence sufficiently establishes a practical construction of the lease by the parties, and sustains a finding according to such evidence.

Id.—CLAUSE AS TO RIGHTS OF MINERS—MISUSE OF WORD.—A clause in the lease conferring upon the lessees "such other rights and privileges as are vested in mines under the laws of the United States and of the state of California," cannot be treated as meaningless because of the use of the word "mines," instead of "miners," and is intended to confer upon the lessees the rights conferred upon prospectors of mining-ground by the laws of this state and of the United States.

Id.—FORFEITURE OF LEASE—WAIVER—RIGHTS OF LESSOR—BREACH OF CONDITIONS OF RENEWAL.—The waiver of a forfeiture of the lease for breach of conditions, by not insisting thereupon, could not affect the right of the lessor to defeat a renewal of the lease for breach of conditions upon the faithful performance of which the right of renewal depended.

Id.—DEVELOPMENT—AMOUNT OF EXPENDITURE—CESSATION OF WORK.—The amount expended in the development of oil under the lease was properly proved; but the amount expended in the beginning of the operations could not excuse a subsequent cessation of work, in breach of a condition of renewal of the lease.

Id.—EVIDENCE—EXPECTATION OF STOCKHOLDERS AND DIRECTORS.—Evidence was not admissible to prove that the stockholders and directors of the defendant corporation expected and counted upon a renewal of the lease. Without a performance of the conditions of the lease, their expectations were of no avail, and with it unnecessary.

Id.—UNDERSTANDING OF PARTIES—MEANING OF CONTRACT.—The court properly excluded evidence to show the understanding of the parties touching the meaning of the contract at the time it was executed.

APPEAL from an order of the Superior Court of Santa Barbara County denying a new trial. H. T. Williams, Judge presiding.

The facts are stated in the opinion of the court.

B. F. Thomas, for Appellants.

The evidence of custom was not admissible, there being no showing that the parties contracted in relation thereto. (Lawson on Usages and Customs, sec. 38; *Pittsburg etc. R. R. v. Nash*, 43 Ind. 423; *Chicago etc. R. R. Co. v. Dickson*, 143 Ill. 368.) A waiver of a right of forfeiture of the lease does not include a waiver of condition precedent to a renewal of the lease. (Taylor on Landlord and Tenant, 6th ed., sec.

47, 339; *Duffield v. Michaels*, 97 Fed. 825.) The evidence does not sustain a right to a specific performance of the contract for renewal. (Waterman on Specific Performance, sec. 452; Wood on Landlord and Tenant, sec. 416; Pomeroy on Contracts, secs. 334, 357; *Jones v. Durrer*, 96 Cal. 99; *McGlynn v. Moore*, 25 Cal. 384; *Baird v. Milford Land etc. Co.*, 89 Cal. 552; 3 Pomeroy's Equity Jurisprudence, 1st ed., sec. 1407.) Erroneous conclusions from the findings constitute a decision against law. (*Bosquett v. Crane*, 51 Cal. 505.) The insufficiency of the cross-complaint to sustain the decision is a decision against law, which may be considered on appeal from an order denying a new trial. (*Simmons v. Hamilton*, 56 Cal. 495.) The specifications of insufficiency of the evidence to sustain the findings were proper in form. (*Kyle v. Craig*, 125 Cal. 107; *DeMolera v. Martin*, 120 Cal. 544; *Newell v. Desmond*, 63 Cal. 242; *Harnett v. Central Pacific R. R. Co.*, 78 Cal. 32; *Smith v. Ellis*, 103 Cal. 294; *Livestock G. P. Co. v. Union Stockyard Co.*, 114 Cal. 447.)

E. W. Squier, and John J. Squier, for Respondents.

The court cannot upon this appeal from an order denying a new trial consider the sufficiency of the pleadings or of the findings to support the judgment. (*Brison v. Brison*, 90 Cal. 323; *Tompkins v. Montgomery*, 123 Cal. 219; *Wheeler v. Bolton*, 92 Cal. 159, 167; *Hall v. Susskind*, 120 Cal. 559, 565; *In re Doyle*, 73 Cal. 564; *Byrbee v. Dewey*, 128 Cal. 322; *Rauer v. Fay*, 128 Cal. 523; *Schroeder v. Pissis*, 128 Cal. 209; *Riverside Water Co. v. Gage*, 108 Cal. 240; *Kirman v. Hunnewill*, 93 Cal. 526; *Bode v. Lee*, 102 Cal. 583.) Equity will decree specific performance of a covenant to renew a lease without regard to the materiality of the remedy. (Pomeroy on Specific Performance, 2d ed., sec. 9; Fry on Specific Performance, sec. 948; *McCarger v. Rood*, 47 Cal. 138.) The specifications of insufficiency of the evidence to justify the findings are not sufficient. (Code Civ. Proc., sec. 659; *Kyle v. Craig*, 125 Cal. 107, 116; *De Molera v. Martin*, 120 Cal. 544; *Spotts v. Hanley*, 85 Cal. 155; *Taylor v. Bell*, 128 Cal. 306.) The defendants have waived any breach of the conditions of the lease, and should not be heard to insist upon this in resistance to a specific performance of the covenant of re-

newal. (Waterman on Specific Performance, 1st ed., sec. 455; *McGlynn v. Moore*, 25 Cal. 534; *Steele v. Branch*, 40 Cal. 3, 13; *Jones v. Durrer*, 96 Cal. 96; *Witmer Bros. v. Weid*, 108 Cal. 569; *Ireland v. Nichols*, 46 N. Y. 415; *Cowper v. Duryea*, 90 N. Y. 599; *Smith v. Rector St. Philip's Church*, 107 N. Y. 610; *Webster v. Nichols*, 104 Ill. 172; *Jolly v. Single*, 16 Wis. 284; *Garnhart v. Finney*, 40 Mo. 449;¹ *Hukill v. Myers*, 36 W. Va. 639.) Proof that defendant was relying on a renewal of the lease was proper. (*Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48;² *Goodspeed v. East Haddam Bank*, 22 Conn. 530.³) Evidence of custom in regard to the use of oil for fuel was proper. (*Coleman v. Clements*, 23 Cal. 245; *Webb v. Day*, 111 Cal. 571; *Morton v. Solambo Min. Co.*, 26 Cal. 528.)

BEATTY, C. J.—The appeal in this case is from an order overruling a motion for a new trial. After affirmance of the order in Department, a rehearing was granted, because of the error there committed in holding that the specifications in the statement were insufficient to entitle the appellants to a review of the findings of fact for the purpose of determining whether they were sustained by the evidence.

The first part of the Department opinion, however, containing a statement of the case and disposing of certain contentions of the appellant, to the effect that the cross-complaint of defendant was insufficient to sustain the judgment, and the findings insufficient to sustain the conclusions of the superior court, is approved and readopted as the opinion of the court in Bank, as follows:—

“The complaint alleges the ordinary action in ejectment to recover possession of eighty acres of land leased by plaintiffs to the assignors of defendant Occidental Mining and Petroleum Company for mining purposes. Defendant High was an employee of defendant company, and has no interest in the subject-matter of the action. In the opinion the word ‘defendant’ will have reference to the company. Defendant filed an answer, and also a cross-complaint, both of which were amended by leave of court.

¹ 93 Am. Dec. 303.

² 58 Am. Dec. 422.

³ 91 Am. Dec. 672, and note pp. 680, 681.

"The amended cross-complaint of defendant alleges: The execution of a lease of the land by plaintiffs, setting forth the document *in haec verba*; the assignment to defendant, performance by defendant and its predecessors; offer to execute a renewal and tender by defendant to plaintiffs. In a second count allegations much the same as in second defense in the answer are set forth, praying that the renewal provided for in the lease be decreed to be specifically performed; or, in other words, that plaintiffs be required to execute a new lease. Plaintiffs, answering the cross-complaint, denied the allegations as to performance and alleged discontinuance of the work for periods specified; alleged, also, the wrongful cutting of timber and the burning of oil for fuel; failure to pay royalties as required by the lease. The pleadings are verified. The court made findings substantially in accordance with the allegations in the amended answer and amended cross-complaint, and entered its decree enforcing specific performance of the covenant for a renewal of the lease as prayed for in the cross-complaint.

"Plaintiffs moved for a new trial upon a statement of the case, which being denied, they appeal from the order. There is no appeal from the judgment. There was no demurrer to the cross-complaint or answer.

"It is urged by appellants that the findings are insufficient to support the judgment, and that the cross-complaint does not state a cause of action, and that the conclusions of law are unsupported by the findings.

"The insufficiency of the complaint cannot be considered on an appeal from an order denying a motion for a new trial, nor on such motion can the question whether the findings sustain the judgment be considered. (*Martin v. Matfield*, 49 Cal. 42; *Brison v. Brison*, 90 Cal. 323; *Bode v. Lee*, 102 Cal. 583; *Bauer v. Fay*, 128 Cal. 523, and numerous other cases.) Where the conclusions of law are claimed to be erroneous and not consistent with, or not supported by the findings, the moving party may proceed under sections 663 and 663½, Code of Civil Procedure (*Shaffer v. Lacy*, 121 Cal. 574); and where this course is not pursued there must be an appeal from the judgment, or the sufficiency of the findings to support the judgment cannot be considered. (*Patch*

v. *Miller*, 125 Cal. 240.) . . . This court is limited in its review of the action of the lower court, on appeal from the order denying a new trial, to the grounds upon which the new trial was asked. (*Wheeler v. Bolton*, 92 Cal. 159.) Appellants cite *Simmons v. Hamilton*, 56 Cal. 493, and claim that it was there held that the conclusions of law found by the court and the sufficiency of the pleadings could be considered on motion for a new trial. This case has been referred to on the point but once, so far as I can find (*In re Doyle*, 73 Cal. 564), and it was there said that 'a party cannot demand a new trial upon the ground that the court erroneously applied the law to the facts, or drew wrong conclusions of law from the facts found. The remedy in such case is by appeal. . . . Nothing to the contrary was decided by a majority of this court in *Simmons v. Hamilton*, 56 Cal. 493.' If there is anything in the *Simmons* case contrary to the rules above stated, it must be deemed to have been long since overruled. We must, therefore, confine our inquiry to alleged errors of law properly specified in the statement and determine whether the evidence is insufficient to justify the findings in so far as it is so specified."

In addition to the foregoing extract from the Department opinion, it may perhaps be useful to point out a distinction which has not heretofore been stated in direct terms, but is clearly deducible from our former decisions upon the question of moving for a new trial on the ground that the verdict or other decision "is against law."

Decisions against law are of two kinds. As to one kind, a new trial is always an effective, and often the only, means of correcting the error. As to the other kind, a new trial would be a vain and useless proceeding. In the first class of cases the motion is properly made, and error in overruling it is reviewable on appeal from the order. In the second class of cases, since a new trial would afford no relief, and since other and effective means of relief are expressly provided in the Code of Civil Procedure (secs. 663 and 663½), the motion for a new trial is necessarily overruled by the trial court and the order affirmed here. An example of the first class is where the trial court has failed to make any finding upon some material issue. The omitted fact being essential to the

judgment, a new trial for the purpose of determining the issue is the appropriate remedy, and the refusal to grant it is reviewable on appeal from the order. (See *Knight v. Roche*, 56 Cal. 17; *Spotts v. Hanley*, 85 Cal. 168; *Haight v. Tryon*, 112 Cal. 6.) An example of the second class is where the findings are full and complete as to all the issues, and fully sustained by the evidence, but the conclusions of law are erroneous or misapplied in framing the judgment. In such a case it is plain that a new trial—a re-examination in the same court of the issues of fact, or some of them, (Code Civ. Proc., sec. 656)—would accomplish nothing, whereas a motion in pursuance of section 663 to vacate or correct the judgment would secure the appropriate relief in the trial court, or, if relief was denied there, it could be secured by an appeal from the judgment.

If we have succeeded in making this distinction clear, it amounts to this: That a motion for a new trial on the ground that the decision is against law, is or is not permissible according as a new trial is or is not the means of correcting the error in the decision, and it is not a means of such correction when the only fault in the findings is that they do not support the legal conclusions drawn from them, and still less is it a means of remedying a fault in the pleadings or an error in granting relief unwarranted by the pleadings. So far, therefore, as the motion for a new trial was based upon any supposed defects in the cross-complaint, or errors in the conclusions of law or in the judgment, it was properly denied.

But the motion was also based upon numerous exceptions to rulings of the superior court at the trial, and upon the further ground that the findings were in several particulars contrary to the evidence. There is no claim that the alleged errors in the rulings of the trial court are not properly specified, but respondent does contend that the specifications of findings unsupported by the evidence were insufficient to warrant the trial court in considering that ground of the motion, and, consequently, that this court cannot now consider it.

We think, however, that most of these specifications, if not all of them, are in every respect sufficient. They clearly designate the findings and parts of findings which it is claimed the evidence does not justify, and that is all that is

required. The first case cited by respondent in support of his objection is *Kyle v. Craig*, 125 Cal. 116. The passage cited is not very clear in its statement of the supposed defects in the specifications there considered, and may be understood as countenancing the notion that the statute requires a specification of evidence in connection with the specification of the particular finding. But if so understood, it conveys an erroneous impression. No reference to the evidence is required in the specification except to say that it is insufficient to justify the particular finding called in question. The reasons for this construction of the statute are very clearly pointed out in the next case cited by respondent,—*De Molera v. Martin*, 120 Cal. 544,—as they had been pointed out frequently before. (See *Eddelbuttel v. Durrell*, 55 Cal. 279; *Dawson v. Schloss*, 93 Cal. 200.)

The substance of all these decisions is, that the object of the rule requiring these specifications is first to shorten the statement of the evidence by excluding everything irrelevant to the specified fact; and, second, to notify the opposing party of the particular finding called in question, in order that he may see that the statement fairly and fully presents the evidence bearing upon that particular matter. This object accomplished, the statute is satisfied, and the more recent decisions of the court have shown a disposition to construe specifications liberally in favor, rather than strictly against, the right of the moving party to be heard. This view is well and strongly stated by Justice Temple in *American Type etc. Co. v. Packer*, 130 Cal. 461, and has since been reaffirmed in several cases recently decided. (See *Stuart v. Lord*, 138 Cal. 672; *Drathman v. Cohen*, 139 Cal. 310; *Holmes v. Hoppe*, 140 Cal. 212; see, also, *Owen v. Pomona Co.*, 131 Cal. 539; and *Standard etc. Co. v. Habishaw*, 132 Cal. 124.)

In view of the rule as laid down and applied in these cases, and, indeed, in view of the stricter rule of *De Molera v. Martin*, 120 Cal. 544, the principal specifications in this statement must be held sufficient, and so holding we proceed to consider them.

The lease set out in the cross-complaint was of eighty acres of land known to contain petroleum, and its purpose was to develop the productive capacity of the ground. The lessees were granted the exclusive right for a term of ten

years, from the sixth day of April, 1889, to make excavations, dig wells, etc., upon the premises, and to extract and sell coal, coal-gas, petroleum, asphaltum, clay, and mineral substances of every character contained upon or within said lands, and to erect necessary buildings and machinery, to construct roads, and use and convey water. Of the proceeds of sales of such mineral products they were to retain nine tenths and pay the remaining one tenth to the lessors.

These provisions of the lease were subject to the following covenants and conditions:—

“1st. Said party of the second part shall, within three months from the date hereof, commence work to prospect for and to extract from said lands either or all of said substances above mentioned, and shall continue to prosecute work for such purposes during said period of ten years in developing and rendering such property productive, and any discontinuance of work for a period of four months shall, at the option of said parties of the first part, upon written notice, work a forfeiture of any and all privileges herein and hereby granted, and in case the net proceeds derived from said property shall in any one year amount to less than six hundred dollars, then and in that case all the privileges herein and hereby granted shall be forfeited, unless the parties of the second part shall be actually employed in the prosecution of said work.

“2d. Said grantee shall, on demand, pay monthly to said grantors, during said period of ten (10) years, one tenth (1-10) of their gross earnings derived from sale of the products or substances aforesaid, found or mined on said above-described lands; and said grantors at all times to have access and full and unrestricted permission to inspect, examine, and take copies of all books, accounts, and memoranda in the possession of said grantees, belonging or appertaining to said business.”

It was finally provided that a faithful compliance with these covenants should entitle the grantees, or their assigns, to a renewal for a like term.

The issues tried by the superior court were those made by the answer to the cross-complaint denying its allegation of compliance with the conditions upon which the stipulation to renew was made to depend, and the findings were generally

that all the covenants on the part of the lessees had been fully performed, and specifically that each of the conditions had been performed, except where, in some particulars, performance had been waived.

There are the findings attacked by the specifications. The evidence in the transcript is voluminous, and shows that the defendant, within the time stipulated, entered upon the demised premises and commenced and carried on the work of exploration and development energetically, and at large outlay for four or five years, but that it did not succeed in materially increasing the amount of oil flowing from a small excavation or tunnel which has been opened before it took possession. During this time it drove a tunnel a distance of some four hundred feet and sank seven wells within a space of five acres.

The tunnel has continued to yield a small quantity of oil, and, by pumping, some oil was obtained from two or three of the wells, but they seem finally to have been, to a great extent, abandoned. This, in general terms, was the condition of affairs on the 31st of March, 1899, when plaintiffs notified the defendant that they would not renew the lease. The impression left upon the mind from a consideration of all the evidence in the record, and especially of the admissions and qualifications elicited by cross-examination of defendant's witnesses, is, that the work of exploration and development during the last half of the ten-year term was not at any time vigorously pushed, but with respect to two periods,—viz., from July, 1894, to December, 1895, and from April, 1898, to February, 1899,—it clearly appears by the uncontradicted evidence that no work of development whatever was done. The evidence offered by defendant is to this effect, and part of it—with reference to the first period—was derived from the defendant's books of account, which showed that between August 1, 1894, and November 21, 1895, the only persons receiving compensation from the defendant were George Streeter and its secretary. The salary of the secretary, of course, cannot count in the matter of development, and Streeter, whose wages were \$1.25 per diem, was employed exclusively in pumping oil and at odd times in working on roads and trails. He testifies to a complete cessation of development work from July or August, 1894,

to November, 1895. There is nothing to contradict this evidence. We have carefully examined those portions of the record cited by respondent as supporting the finding of the court and cannot discover anything to sustain their contention. The testimony of Mr. Frink merely identifies certain vouchers in the shape of receipts for wages. All of these payments were made prior to July, 1894, except one, and several of them in 1893. And the single one made subsequent to July, 1894, was for labor performed prior to December 1, 1893. The testimony of Mr. Johnson shows nothing different, and the same may be said of the testimony of Snow. The testimony of Judge Day is in relation to work of comparatively trifling amount done on roads and trails by Streeter and others, and does not show when it was performed. Altogether, the proof is clear that no work of development was done between July, 1894, and December, 1895, unless the pumping of oil, and a little work on the roads by one man—when not engaged in pumping,—answers that description, which it clearly does not. The evidence on the part of defendant with reference to the period between April, 1898, and February, 1899, is equally unsatisfactory.

The testimony of Frink is again in relation to vouchers for wages paid for work done prior to May, 1898, except in the case of Snow, who had taken the place of Streeter as caretaker, and did no work of development. Snow's testimony shows that he was merely in charge of the works, keeping things in order and removing obstructions to the flow of oil from the tunnel, and that work was recommenced on the tunnel in February, 1899. Mr. Eddy's testimony is to the effect that a written contract to extend the tunnel was signed by certain parties in August, 1895, but it is not shown that any work was ever done under the contract. On the contrary, there is evidence that the parties executing this or a similar contract, after visiting the tunnel, abandoned it, and the difficulty of procuring men willing to do the work is the excuse of defendant for its failure to prosecute it more vigorously.

It is unnecessary to discuss other exceptions to the findings, for if the two above considered are material—a point as to which we have no doubt—their want of support in the evidence compels a reversal of the order denying a new trial,

and as to other disputed facts they may be properly left to the consideration of the trial court, unaffected by any expression of opinion on our part.

Some questions of law discussed in the briefs and likely to become the subject of controversy upon a retrial of the issues of fact require to be noticed in connection with the foregoing discussion. It was proven by plaintiffs, and in effect found by the court, that the defendant cut some brushwood and timber, growing on the land, and used it for fuel to generate steam in the work of development; also, that the oil produced on the premises was used for the same purpose and not accounted for. These things were done by defendant under a claim that a clause in the lease conferred the right to use the firewood and a local custom justified the use of the oil and the omission to account for it. As to the latter, we do not think there was any competent evidence of a custom that could modify the terms of the lease; but the terms of the lease are far from clear on this point, and the court finds upon evidence which we deem satisfactory that the plaintiffs knew and acquiesced in the practice of using the oil for fuel in carrying on the work of development, and that they never made any demand on account of the oil so used. This was a practical construction of the contract by the parties themselves or a waiver by plaintiffs of a doubtful right, and by itself certainly ought not to defeat the right of the defendant to a renewal. The cutting of brushwood and timber for fuel, if it amounted to substantial waste, and was done without the knowledge and consent of the plaintiffs, would present a different question. The finding is, that there was no substantial injury done to the freehold by such cutting as was done, and that the plaintiffs knew and consented to it. The evidence on this point, however, is in some conflict, and if on a new trial the facts should be found differently, a question would arise upon the construction of a clause in the contract which confers upon the lessees, among other privileges, the following: "such other rights and privileges as are vested in mines under the laws of the United States and of the state of California." We do not think this clause can be treated as meaningless merely because the word "mines" is used where perhaps the word "miners" would have better expressed the intention of the parties. We have no doubt

it was intended to confer upon the lessees the rights—whatever they are—that are conferred upon prospectors of mining-ground by the laws of this state and of the United States.

We are not sure that the respondent means to contend that the failure of appellants to insist upon forfeiture of the lease for waste or breach of covenant, precludes them from refusing to grant another term, though there are passages in his brief which seem to assert that proposition. If the contention is made it cannot be sustained. The waiver of the forfeiture is one thing; the renewal of the lease is quite another. The neglect of the landlord to strictly enforce his right of forfeiture for breach of condition does not entitle the tenant to a renewal when such renewal is dependent upon faithful performance of conditions. There is no finding, and no evidence to warrant a finding, that plaintiffs consented to any cessation of the work of exploration and development, and their mere failure to enforce a forfeiture for the cessations which occurred in 1894-1895 and 1898-1899 was not a waiver of performance of the conditions upon which they had bound themselves to renew the lease. (Pomeroy on Contracts, secs. 355-359, and notes; *Gannett v. Albree*, 103 Mass. 372; *Duffield v. Michaels*, 97 Fed. 825. And see further upon the propositions here considered, Woods on Landlord and Tenant, sec. 413; Waterman on Specific Performance, sec. 452; Pomeroy's Equity Jurisprudence, sec. 1407.)

We cannot undertake to discuss in detail the numerous exceptions to the rulings of the court at the trial. It was not error to admit evidence as to the amount of money expended by defendant in pursuance of its agreement to explore and develop, but the amount expended in the beginning of operations could not excuse a subsequent cessation of work.

It was error to allow the stockholders and directors of the company to testify that they expected and counted upon a renewal of the lease. The only way they could entitle themselves to a renewal was by performing the conditions of their lease. Without this their expectations were of no avail, and with it unnecessary. And if in any view this testimony had been admissible, the plaintiffs should have been allowed greater liberty of cross-examination.

The court did not err in excluding evidence as to the understanding of the parties touching the meaning of the contract at the time it was executed. The evidence of a custom allowing the prospector to burn the oil produced on the claim was incompetent, but it was competent to show that the plaintiffs acquiesced in the claim of defendant to the exercise of that right under the terms of the lease.

The order denying a new trial is reversed and the cause remanded.

McFarland, J., Shaw, J., Angellotti, J., and Lorigan, J., concurred.

Rehearing denied.

[Sac. No. 1130. Department Two.—November 30, 1903.]

SIMON NEWMAN COMPANY, Respondent, v. JOHN F. LASSING, Appellant.

UNLAWFUL DETAINER—DEFENSE—FRAUD IN OBTAINING DEED AND LEASE—RESCISSIION NOT REQUIRED.—In an action of unlawful detainer for holding over after the expiration of a term of lease, the defendant may set up in defense that the plaintiff procured a deed from the defendant and the agreement of lease by fraud and undue influence; and an answer setting up such fraud and undue influence, and asking for no affirmative relief, need not set up a rescission; nor is it necessary that the defendant must first go into an equity court and have the deed set aside.

ID.—EVIDENCE—SINGLE TRANSACTION.—The defendant may show as part of the transaction leading up to the lease, and as evidence bearing upon the question of fraud and undue influence in the execution of the lease, that the deed, as well as the lease, was so executed, and to show the relation of each to the other as one transaction.

ID.—ORDER GRANTING NEW TRIAL—GROUNDS—OPINION OF COURT—REVIEW UPON APPEAL.—An order granting a motion for a new trial, in general terms, will be sustained upon appeal, on any tenable ground; and the fact that an opinion of the court found in the record states the point on which the court rested the order does not preclude this court from reviewing the case and sustaining the order on other grounds.

ID.—PLEADINGS, FINDINGS, AND JUDGMENT, NOT REVIEWABLE.—Upon appeal from an order granting a new trial, the insufficiency of the pleadings or of the findings to support the judgment cannot be considered.

APPEAL from an order of the Superior Court of Merced County granting a new trial. E. N. Rector, Judge.

The facts are stated in the opinion.

Sullivan & Sullivan, for Appellant.

Naphtaly, Freidenrich & Ackerman, J. K. Law, T. C. Law, and Henry C. McPike, for Respondent.

CHIPMAN, C.—This is an appeal from an order granting plaintiff's motion for a new trial. The action is unlawful detainer. The cause was tried by the court with a jury, and defendant had the verdict. The grounds of the motion were insufficiency of the evidence to justify the verdict and errors of law occurring at the trial. The order granting the motion is general.

In an opinion found in the record the court stated the point on which it rested the order. It is well settled that the ground upon which a new trial is granted by the trial court does not prevent this court from reviewing the case and sustaining the order on other grounds (*Kauffman v. Maier*, 94 Cal. 262; *Churchill v. Flournoy*, 127 Cal. 355); and the filing of an opinion by the court does not affect the rule. (*Newman v. Overland Pacific Ry. Co.*, 132 Cal. 73.)

The demurrer to the complaint for insufficiency of facts alleged, or that the judgment is not supported by the findings, or that the latter are inconsistent with the pleadings, cannot be considered on motion for new trial where there is no appeal from the judgment. (*Moore v. Douglas*, 132 Cal. 399.)

The complaint alleges an agreement of lease made on December 7, 1900, for the term ending December 1, 1901, under which defendant went into possession of the premises involved; alleges the expiration of the term, and that defendant is holding over without plaintiff's permission and contrary to

the provisions of the lease; alleges demand in writing of defendant for possession; that three days have elapsed since making said demand, and defendant refuses to quit possession. The amended answer denies specifically the material allegations of the complaint, and as further defense alleges the ownership of a large tract of land, of which the land in question is a part; that defendant is a farmer, and for many years—to wit, ever since 1878—dealt with Simon Newman, and later with plaintiff corporation, purchasing from them a great deal of merchandise, and through them disposing of most of his farm products; that they kept all of his accounts up to January 1, 1901, and defendant kept no books; that Simon Newman was manager of the corporation, and a man of large business experience; facts intended to show certain alleged confidential and fiduciary relations between defendant and Newman during all said time are set forth, and it is alleged that on November 30, 1900, defendant owed plaintiff sixty thousand dollars, and no more; that defendant was then seventy-two years old, and much impaired in body and mind; that on said last-named date he was, and had been for several days, under the influence of liquor to such an extent as to be incapable of attending to business; that within two or three days prior to said date, and on that day, Newman and one Solomon Wangenheim made certain false and fraudulent representations to, and uttered certain threats against, defendant, as set forth in the answer, by reason of which defendant signed a deed conveying to plaintiff all of said property; that on December 7, 1900, (seven days after the deed was executed,) one E. S. Wangenheim, on behalf of plaintiff, represented to defendant that he, defendant, had no longer any interest in the said land, and unless he would execute his note for \$936 to plaintiff, he would be excluded from said premises, but if such note was given, he could remain in possession of the land described in the complaint for one year from said date; that defendant believed said representations, and executed said note, but that if he had known of his rights in the premises, he would not have given the note, nor would he have remained in possession under said agreement.

The view taken by the learned trial judge, as shown by his opinion found in the record, was, that there was no evidence whatever that fraud or undue influence was resorted to by plaintiff in obtaining the lease, nor was it shown that defendant was acting under mistake of law or fact. As to the alleged fraud and undue influence used at the making of the deed, the trial court held that it was insufficient, even if proven, without some evidence tending to show that the lease was made under some such influence or through what would be regarded as mistake of law or fact legally appearing, and hence that "the evidence tending to show fraud in the execution of the deed cannot be considered." The evidence of alleged fraud attending the execution of the deed is in conflict, and there is evidence tending to show that defendant was mentally competent and fully understood the nature of the transaction, and entered into it free from any undue influence of plaintiff. The order may rest upon the insufficiency of the evidence to justify the verdict. We do not deem it necessary to notice the numerous alleged errors of law occurring at the trial; they relate to the admission or exclusion of evidence and to certain instructions given or refused by the court, and may not arise again.

It is objected by appellant that the description given the property in the complaint is so defective as to make the lease void. As there must be a new trial, the plaintiff may obviate this objection, if well grounded, by amendment of the complaint or by evidence at the trial. In the present stage of the case defendant is not injured, for no relief under the complaint has as yet been given plaintiff. The evidence tends to show that defendant understood what land was embraced in the lease, and no doubt a correct description of it can be given if it has not been.

Respondent contends, as we understand the brief of counsel, that defendant is estopped to deny his landlord's title under the general rule that a lessee cannot, in an action involving possession or right of possession, question the title of his landlord; that defendant must first go into the equity court and have the deed set aside, if made through fraud or undue

influence. While desiring to avoid the discussion of questions that may not hereafter arise, it is proper, perhaps, to say that, in our opinion, the defendant may show, as part of the transaction leading up to the lease, and as evidence bearing upon the question of fraud and undue influence in the execution of the lease, that the deed as well as the lease was so executed, and to show the relation of each to the other as one transaction. Defendant is not seeking rescission, nor is he asking to have the deed set aside as void; he is simply defending against plaintiff's action on the ground of fraud and undue influence, and asks no affirmative relief. We think he may do this without first rescinding. (*Field v. Austin*, 131 Cal. 379, and cases cited. See also, *Hart v. Church*, 126 Cal. 471.¹) The answer is intended to set forth what in *Toby v. Oregon R. R. Co.*, 98 Cal. 490, is termed "Defensive relief, whereby the fraud is set up by way of defense to defeat an action brought to enforce an apparent obligation or liability." (Pomeroy's Equity Jurisprudence, sec. 872.)

It is advised that the order should be affirmed.

Smith, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion, the order is affirmed. McFarland, J., Lorigan, J., Henshaw, J.

Hearing in Bank denied.

[L. A. No. 1112. Department Two.—November 30, 1903.]

WILLIAM CRAIG et al., Respondents, v. CRAFTON WATER COMPANY, Appellant.

WATER-RIGHTS—ADJUSTMENT OF RIGHTS IN USE OF DITCH—DOMESTIC USE—FLOW FOR PERIOD OF TIME.—In the adjustment of the rights of the parties to the use of water flowing in a ditch, where the court finds that the rights of the defendant are subject to the rights of plaintiffs to use the water for domestic purposes and for watering stock, it is not reasonable to decree that plaintiffs are

¹ 77 Am. St. Rep. 195.

entitled to the continuous flow of any given quantity of water, but there should be an equitable apportionment of such use by allowing a continuous flow for a definite period of time to the plaintiffs entitled to such use.

ID.—RIGHTS BELOW POINT OF DIVERSION.—The plaintiffs, through whose lands the ditch runs below the point of diversion of the defendant, are entitled to all the water remaining in the ditch below such point of diversion, at the time when plaintiffs' diversion begins. The rights of persons not parties below the plaintiffs' lands cannot be regarded as material as against the defendant.

ID.—CONSTRUCTION OF DECREE—FINDINGS—AGREEMENT OF PARTIES—SELECTION OF PLACE OF DIVERSION—ACQUIESCENCE.—A former decree fixing the rights of parties thereto, is to be construed in connection with an agreement found by the court to have been made between the owner of a ranch and parties below it, that he should use all the waters of a creek on the ranch during certain hours each day, as giving such owner the right to select the place of diversion at the highest point on his ranch; and when it appears that such other parties below acquiesced in such selection, and made an agreement as to their time of diversion accordingly, they cannot complain of such selection by the original owner of the ranch, or by the defendant after he acquired title to the higher part thereof, under deeds from the plaintiffs, regardless of the construction of such deeds.

ID.—APPEAL—REVIEW OF EVIDENCE—SUFFICIENCY OF SPECIFICATIONS—SURPLUSAGE.—A specification of insufficiency of the evidence to sustain a finding, which refers to the finding with sufficient clearness, is not vitiated by reference to a wrong number, and to language of the complaint not found in the finding. Such number and incorrect language may be disregarded as surplusage.

ID.—FINDING UPON SEVERAL POINTS—UNDISPUTED MATTER—RESPONDENT NOT MISLED.—The fact that the finding assailed contained several propositions, but the only disputed matter related to a single proposition, will not vitiate the specification where the respondent was not misled in the preparation of the statement which contains all the evidence.

APPEAL from an order of the Superior Court of San Bernardino County denying a new trial. Frank F. Oster, Judge.

The facts are stated in the opinion.

Otis & Gregg, and E. R. Annable, for Appellant.

Bicknell, Gibson & Trask, and Curtis & Curtis, for Respondents.

SMITH, C.—This is a suit to determine the several rights of the parties to certain of the waters flowing in the Mill Creek zanja, or water-ditch, in the county of San Bernardino. The judgment was for the plaintiffs. The appeal is from an order denying the defendant's motion for new trial.

The zanja in question runs westerly from Mill Creek, past the point of diversion of the defendant's water, or, as it is called, "the Crafton intake," through the lands of the plaintiffs and others (being part of the tract known as the Carpenter ranch), to lands in the vicinity of old San Bernardino, known as the Cottonwood Row. These lands and others form parts of the Rancho de San Bernardino, granted in the year 1842 to Lugo and others; and in the year 1876 there was a suit in the district court of San Bernardino County, between the owners, respectively, of the lands of the Carpenter ranch and those of the Cottonwood Row, in which, in June, 1876, there was entered a judgment determining the respective rights of the then owners of the waters of the zanja, which judgment was by this court affirmed. (*Cave v. Crafts*, 53 Cal. 135.) The plaintiffs in that suit consisted of Barton and others, owners of lands in the Cottonwood Row, with Cave, Craig, and Standford and associates, owners of Carpenter ranch lands; and the defendants, of Myron H. Crafts, who was also an owner of Carpenter ranch lands, and others whose interests are not involved here. The effect of the judgment was to determine that the owners of the Carpenter ranch lands were entitled to the use of the water in question for irrigation between the hours of three and nine o'clock P. M. of each day, and the owners of the Cottonwood lands, for the balance of the time. But it was also adjudged that these rights were subject to the rights of the owners of the Carpenter ranch lands and other upper proprietors to the use of the water for domestic purposes and for watering stock. By the decree it was also determined that the rights of the owners of the Carpenter lands, as among themselves, were as follows: that is to say, the plaintiff Cave to have the use of the water for one day of the week, and the other plaintiffs (counting Standford and associates as one), and the defendant Crafts, each for two days.

Of the plaintiffs in the present suit, William Craig is the plaintiff Craig of the former suit, and the plaintiffs Charlotte Craig and Payne claim under him. The plaintiffs Bowers and Bean have succeeded the former to two, and the latter to one, of the six hours' use of the water per week, adjudged in the former suit to plaintiff Cave.

The defendant is a corporation, organized in or prior to the year 1886, and it is admitted that, under conveyances from owners of the Carpenter Ranch water-rights—made in consideration of stock of the company, entitling them to the use of specified quantities of water—it has succeeded to the right to divert the waters of the zanja, for irrigation, between the hours of three and nine o'clock P. M., except for the three hours belonging to the plaintiffs Bowers and Bean. But it is found by the court: 1. That this right is subject to the rights of the plaintiffs to use the waters of the creek for domestic purposes and for watering stock; and 2. That the plaintiffs are entitled to the water in the zanja below the Crafton intake at the hour of three o'clock P. M., or, as it is called, "the three-o'clock water," except on Mondays, and on two other days of each ten days; the former being the day on which the plaintiffs Bowers and Bean are entitled to the water, and the latter, days on which the water has habitually flowed to lower proprietors.

1. With regard to the former finding, it is clear that as to the plaintiffs Payne and William Craig it cannot be sustained. For their deeds conveyed to the defendant, without reservation or exception, the right to divert the whole of the water of the creek, so far as owned by them, between the hours of three and nine o'clock P. M. This is probably true, also, of the plaintiff Charlotte Craig; but as her deed to the defendant's grantors is not in the record, this cannot be positively asserted. As to the plaintiffs Bowers and Bean, it appears they have not parted with their right, and hence (unless they are barred by the adverse user of the defendant) they are still entitled to the use of the water for the purposes specified.

But it does not follow—as is also found by the court—that they are entitled to continuous flow of two inches or any other quantity in the ditch (*Wiggins v. Muscupiabe etc. Co.*,

113 Cal. 189¹), and such a requirement, we think, would be unreasonable. The flow of water in a stream may, and when necessary should be, apportioned between the parties interested "by periods of time rather than by a division of its quantity" (Id. 190); and artificial means of conducting it may be allowed instead of the natural channel. (Id. 195-196.) Or, indeed, it would be in the power of the court to hold that the demands of the plaintiffs entitled to water for domestic use are sufficiently supplied by the constant flow of the water by their places for eighteen hours; to which is to be added, in case the rights of the plaintiffs to the other water in question be established, an additional flow of two or three hours, or perhaps more.

It remains to note that the specification of the appellant on this point is objected to as insufficient. But we do not regard the objection as tenable. The specification attempts to quote the finding objected to, and also to designate its number; but, through inadvertence, the number given and the language quoted is that of the paragraph of the complaint corresponding to the finding, which contains some words not found in the finding. The finding referred to is, however, sufficiently clear, and the matter given in the specification not contained in the finding may be rejected as surplusage. It is also objected, in effect, that the finding contains several propositions, namely: That the plaintiffs are the owners of the water-right described; that they have been such owners for more than twenty years; that they have always had the water flowing in the zanja on their respective places; and that they are entirely dependent on the use of said water, etc. But all these propositions, other than the first, relate to matters entirely immaterial and to questions as to which there is no dispute. They could not, therefore, have misled the respondents in the preparation of the statement, which, in fact, contains all the evidence bearing on the issue. (*Bledsoe v. Decron*, 132 Cal. 312.)

2. As to "the three-o'clock water," the finding is fully justified by the evidence; nor would any other finding have been admissible. The defendant's right, under the deeds of the plaintiffs and others, is to divert the water of the zanja

from three to nine P. M.; and of this right it has been always in full possession and enjoyment. It can therefore have no right to the water in question, which is the water left in the ditch below its point of diversion at three o'clock P. M., the moment of the commencement of its right. This was, indeed, formally admitted by its counsel at the trial; and the court, we think, was right in regarding the admission as conclusive of the case.

It is equally clear that the plaintiffs under the terms of the decree in *Cave v. Crafts*, 53 Cal. 135, are entitled to this water. But were it otherwise, the case would not be altered. For the plaintiffs, in addition to their rights under the decree, are vested with the rights of riparian proprietors,—that is to say, with the rights to use all the waters flowing in the zanja through their lands when not required for use by the Cottonwood people. Nor in a suit against a third party can the rights of the latter be regarded as material.

This conclusion disposes of the appellant's point that the column of water in question belongs to the Cottonwood people. But it will be proper to add that this contention rests upon an illicit assumption, and that the conclusion does not follow from the premise assumed. The assumption is, that the plaintiffs when they made their deeds were entitled, under the decree in *Cave v. Crafts*, to divert the water only at the places at which they were then diverting it; and that this was the right conveyed to the defendant. From which it is argued that the diversion of the water by the defendant at its "intake" (which is found to be two miles above the plaintiffs' lands) was not under the deed, but under the alleged general right conferred upon it by the law to change the place of diversion, provided the rights of others were not injuriously affected. But, assuming this to be the law, it is clear that this change (which was made without any agreement with the Cottonwood people) was prejudicial to them, and hence not permissible. Nor can we conceive of any principle upon which the Cottonwood people could have acquired, by the injury done them, any right to the water in question, which, under the express terms of the decree, belonged to the plaintiffs. The Cottonwood people might, indeed, have resisted the change—a right which they have probably now lost

by defendant's adverse user; but otherwise the rights of the parties under the decree were not in any way affected.

Nor do we think the assumed construction of the findings and the decree in *Cave v. Crafts* correct. In that case it was in effect determined that the Carpenter ranch people were "the owners of all the waters of said Mill Creek, and to have the same flowing in said zanja to and upon their respective lands," during the hours named for each respectively, "being in the aggregate the use of said water between the hours of three o'clock P. M. and nine o'clock P. M. of each day." But this conclusion was based upon and is to be interpreted in connection with the agreement found between the Cottonwood people and Carpenter, when he was owner of the whole of the Carpenter ranch, "Whereby it was agreed that the said Carpenter should use all the waters of the zanja from three P. M. to nine P. M. of each and every day." This cannot be otherwise construed than as giving him the right to divert the water at any point from the source down, or at least at any point on his land, which would include the defendant's "intake"—the point at which four sevenths of it had been diverted while Crafts was yet owner, and where it has been diverted by the defendant ever since it acquired title. We must conclude, therefore, that the effect of the decision was to accord to the plaintiffs and their co-proprietors the right to divert the water at any point on the Carpenter ranch; and whether the plaintiffs' deeds to the defendant be construed as referring to the "Crafton intake" or as leaving the point of diversion to the choice of the defendant, they were entirely within their rights; and the Cottonwood people had no cause to complain. This construction of the decision of the court, and of the agreement on which it rests, is confirmed by the acquiescence of the Cottonwood people in the defendant's act; and by the reference in the findings to the fact that the points of diversion used by the Carpenter ranch people were at distances ranging from one and one half to seven miles above the point used by the Cottonwood people; and by the provision in the findings based on an agreement between the Cottonwood plaintiffs fixing the hour of four o'clock A. M. as the beginning point of the use of the water by them. This allows seven hours from the shutting off of the water by those of the Carpenter ranch at nine P. M.,—a period altogether

unnecessary otherwise than upon the theory that it was the understanding that the whole of the water might be diverted at the highest point, which is now the "Crafton intake."

This view of the case renders it unnecessary to consider other points discussed in the briefs; and it remains only to consider the proper judgment to be entered on the views expressed. This must be, that the order appealed from be reversed, and a new trial ordered, unless the plaintiffs be willing to forego their claims to the use of water for household purposes and watering stock, except so far as secured to them by the eighteen hours' flow of the water to the Cottonwood people, and by the decision in their favor as to the "three-o'clock water"; but if, as will probably be the case, they should be willing to do so, the order should be affirmed.

For the reasons stated we advise that the order appealed from be reversed, and the cause remanded for a new trial, unless the plaintiffs within thirty days, or such further reasonable time as may be allowed by the court below, shall file their written consent, after service of a copy on the defendants, that the judgment be modified by striking therefrom the following words, occurring in the first paragraph of the adjudication, viz.: "and (2) from diverting, interfering with, or in any manner preventing a continuous stream of two inches of water of said creek, measured under a four-inch pressure, from flowing in said zanja at all times to and upon the said farms of plaintiffs for their household use and for watering their stock"; and it is further ordered that, upon the filing of such written consent within the period prescribed by this court, or by the order of the court below, and the modification of the judgment in accordance therewith, the order appealed from shall stand affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed, and the cause remanded for a new trial, unless the plaintiff, within thirty days, or such further reasonable time as may be allowed by the court below, shall file their written consent, after service of a copy on the defendant, that the judgment be modified by striking there-

from the following words, occurring in the first paragraph of the adjudication, viz.: "and (2) from diverting, interfering with, or in any manner preventing a continuous stream of two inches of water of said creek, measured under a four-inch pressure, from flowing in said zanja at all times to and upon said farms of plaintiffs for their household use and for watering their stock"; and it is further ordered, that, upon the filing of such written consent within the period prescribed by this court, or by the order of the court below, and the modification of the judgment in accordance therewith, the order appealed from shall stand affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

[L. A. No. 1155. In Bank.—November 30, 1903.]

JOHN S. BELL, Respondent, v. GEORGE STAACKE et al.,
Appellants.

NEW TRIAL—NOTICE OF INTENTION NOT PREMATURE—SUPPLY OF FINDINGS OMITTED.—A notice of intention of the defendants to move for a new trial is not rendered premature by the supply of omitted findings by the judge upon his own motion, which were in no way connected with the findings upon which the decree in favor of the plaintiff was founded, and are not questioned by either party.

ID.—SPECIFICATIONS OF INSUFFICIENCY OF EVIDENCE—FINDINGS OF PROBATIVE FACTS.—Where probative facts are found by the court, specifications of insufficiency of the evidence to sustain any one of such findings, or any particular contained therein, are sufficient.

ID.—FINDING OF ULTIMATE FACT.—Where the finding is of an ultimate fact, consisting of a conclusion from a number of probative facts, a specification as to the insufficiency of the evidence to sustain such finding is insufficient. [*Per* Lorigan, J., and McFarland, J., Shaw, J., Angellotti, J., and Henshaw, J., *contra*.]

ID.—TRUST—ENFORCEMENT—ADVANCES BY DECEDENT—SECURITY—FINDINGS AGAINST EVIDENCE.—In an action to enforce a trust, one of the purposes of which was that the trustee should hold the title for the plaintiff, where it appeared from the evidence, without substantial conflict, that the deceased uncle of the plaintiff had advanced large sums of money for plaintiff's benefit, for which plaintiff was indebted to him, and that it was the understanding of the parties that the title was held by the trustee also as security to the uncle

for the amount of such advances, findings that the trustee held the title in trust only to convey to the plaintiff, and not as security for plaintiff's indebtedness to the estate of the deceased uncle. were against the evidence.

ID.—PRACTICAL CONSTRUCTION OF CONTRACT—ACTS AND CONDUCT OF PARTIES.—Where the acts and conduct of the parties up to the time of the uncle's death, and a sworn statement of the plaintiff in his original complaint, all tended to show that the trust deed to the land was in lieu of antecedent notes and mortgage held by the uncle as security, and that the deed was intended by the parties as security for the indebtedness then due and to become due from the plaintiff to the uncle for further advances, such acts and conduct of the parties show a contemporaneous and practical construction of the contract which must prevail over the subsequent testimony of plaintiff to the contrary.

ID.—WRITTEN AGREEMENT AS TO NOTES AND MORTGAGES—CHANGE OF SECURITY.—Where a written agreement was made by which notes and a mortgage given upon the sale of land by the plaintiff, were pledged by him to the uncle as security for indebtedness, and the security was changed into land by consent of the parties, in lieu of the notes and mortgages, the land became subject to such written agreement; and the rights of the uncle in the trust property are evidenced thereby.

ID.—ESTOPPEL OF PLAINTIFF.—Where the plaintiff knew that the title was held in the name of his uncle's confidential clerk, and that the uncle claimed the title as security, and upon faith of such security received the advances made by the uncle, and though informed repeatedly that the uncle was making advances on the property, and never by word or act repudiated the uncle's claim, but insisted on the advances being made, he will be held to the agreement as thus understood and acquiesced in by him, and believed to exist when he presented his claim against his uncle's estate, and when he commenced the action.

ID.—EVIDENCE PROPERLY EXCLUDED—DECLARATIONS OUT OF PLAINTIFF'S HEARING—LETTER OF TRUSTEE.—Declarations made by the uncle and his attorney subsequent to the execution of the deed, out of the hearing of the plaintiff, or of any agent representing him, and a private letter of the trustee written after the uncle's death, which plaintiff had never seen or known of, were properly excluded from evidence.

APPEAL from an order of the Superior Court of Santa Barbara County denying a new trial. W. S. Day, Judge.

The facts are stated in the opinion of the court.

T. Z. Blakeman, and D. M. Delmas, for Theresa Bell, Administratrix, Appellant.

The findings are against the evidence, and the specifications are sufficient. (*Strang v. Ryan*, 46 Cal. 33; *American Type Founders' Assn. v. Packer*, 130 Cal. 460; *Owen v. Pomona Land etc. Co.*, 131 Cal. 530; *Standard Quicksilver Co. v. Habishaw*, 132 Cal. 124.) A trust resulted in favor of Thomas Bell. (Civ. Code, sec. 853; *Millard v. Hathaway*, 27 Cal. 119; *Curry v. Allen*, 34 Cal. 254; *Davis v. Baugh*, 59 Cal. 568; *Somers v. Overhulser*, 67 Cal. 237; *Murphy v. Clayton*, 113 Cal. 153; *Polk v. Boggs*, 122 Cal. 114.)

Canfield & Starbuck, for George Staacke, Appellant.

The evidence establishes that the land was held by Thomas Bell as security for money advanced to plaintiff by Thomas Bell, and the land was held subject to the written agreement of August 27, 1887, as a substituted security, resulting to Thomas Bell, who had paid the consideration in money. (*Roach v. Caraffa*, 85 Cal. 436, 446; *Barker v. Hurley*, 132 Cal. 21, 28.)

Richards & Carrier, and James L. Crittenden, for Respondent.

The findings were supported by evidence in their favor, and this court will not disturb findings where the evidence conflicts. (*Sherman v. Sandell*, 106 Cal. 375; *Brison v. Brison*, 90 Cal. 334; *Moore v. Douglas*, 132 Cal. 399, 401; *Gilbert v. Penfield*, 124 Cal. 237; *Broder v. Conklin*, 121 Cal. 222; *Chapman v. Neary*, 115 Cal. 79; *Johnston v. Brown*, 115 Cal. 694; *Ellert v. Cogswell*, 113 Cal. 129; *Loui Soy Wing v. Chung Yick*, 113 Cal. 310; *Guild Gold Min. Co. v. Mason*, 115 Cal. 95; *Senior v. Anderson*, 115 Cal. 496; *Bushnell v. Simpson*, 119 Cal. 658; *Brown v. San Francisco Sav. Union*, 122 Cal. 648; *Chico Bridge Co. v. Sacramento T. Co.*, 123 Cal. 178; *Shafer v. Willis*, 124 Cal. 36.)

LORIGAN, J.—Plaintiff brought this action to have a trust declared in his favor against the defendant Staacke in ten thousand acres of land in Santa Barbara County, the title to which stood of record in the name of the latter, and to com-

pel a conveyance thereof to him by Staacke. The defendants, Staacke individually, and Theresa Bell, as executrix of the estate of Thomas Bell, deceased, by answer and cross-complaint, set up that said lands were held by said Staacke, subject to trust in favor of the estate of said Thomas Bell, for certain advances made by said Thomas Bell in his lifetime, at the instance and for the benefit of plaintiff, and prayed that this latter trust be declared superior to that asserted by plaintiff.

The trial court decreed that the land was held by Staacke in trust solely for plaintiff, and was not subject to any trust in favor of the estate of Thomas Bell, and directed a conveyance by defendant Staacke to plaintiff. The court, however, under the cross-complaint, awarded the administratrix of said estate of Thomas Bell a judgment against the plaintiff personally for some fifty-two thousand dollars, as a balance due by plaintiff for money advanced and loaned him by Thomas Bell, prior to the death of the latter on October 16, 1892.

Defendants appealed from that portion of the decree determining that said land was not subject to any trust in favor of the estate of Thomas Bell, and also from an order denying their motion for a new trial.

The appeal from the judgment was dismissed by this court (*Bell v. Staacke*, 137 Cal. 307), and the order affirmed, the Department decision holding, with regard to the latter, that as to the specifications of alleged insufficiency of evidence to justify the findings complained of therein, they were not properly made and could not be considered. A rehearing was granted on this point, and the appeal from the order is again before us generally for consideration.

It is insisted, preliminarily, by counsel for respondent that the motion for a new trial was properly denied by the lower court, and that the appeal from such order should be affirmed by this court because, he claims, the notice of intention to move for a new trial was prematurely given. There is nothing in this point. The findings and conclusions of law were filed March 6, 1901, in due time, and on March 19, 1901, defendants gave their notice of intention to move for a new trial. Some two months afterwards the judge of the lower court, on his own motion, and reciting that such findings had

been inadvertently omitted, made and filed two additional findings upon two issues raised by the plaintiff's answer to defendants' cross-complaint. They were findings in favor of the defendant Theresa Bell, as administratrix, that the indebtedness of plaintiff to Thomas Bell contained no illegal charges, and that no indebtedness in favor of plaintiff against Thomas Bell, or his estate, ever existed. These were in no way connected with the findings upon which the decree in favor of plaintiff was founded, and neither party attacks them, nor has either party appealed from, or questioned, this part of the decree.

The motion for a new trial was based, among other grounds, upon the insufficiency of the evidence to justify some nineteen, out of twenty-three, findings made by the lower court, and whether they were so justified is the main point to be considered on this appeal. Counsel for respondent contend, again preliminarily, that as far as these challenged findings are concerned, this court cannot review them, because he insists the specifications of insufficiency of the evidence to justify each of them does not point out the particulars in which the evidence so fails to support them, or any of them, and hence are fatally defective in that respect, and relies upon *De Molera v. Martin*, 120 Cal. 547; *Rauer v. Fay*, 128 Cal. 523; *Taylor v. Bell*, 128 Cal. 308, and kindred cases, in support of this point.

These cases, however, have no application to the findings and specifications under consideration. The findings which were attacked in those cases, and specifications pointing to which were declared insufficient, were findings of *ultimate facts*, and it was held that a general specification that the evidence did not justify such a finding was insufficient. The findings which are challenged in the case at bar are findings of *probative facts*, and not *ultimate facts*, and it is this difference which makes the cited cases inapplicable. Here the lower court made full findings on all the probative facts, and almost every one of them is directly attacked by appellants in particular specifications; in many instances they do not attack the entire findings, but cut out some specific probative fact contained therein, and essentially necessary to be sustained by the evidence, and specify that it is not so sustained. This was all that was necessary, and is the correct practice.

The rule in this regard is, that where the fact found by the court is the conclusion from a number of probative facts—an ultimate fact—a specification which only says that the finding of this ultimate fact is not sustained by the evidence is insufficient; but where the findings consist of particular probative facts—a series of facts from which the ultimate fact in issue is to be found—the specification is sufficient if it is leveled directly against any of such particular probative facts thus found, or the particular finding contained in the same.

This is the rule, as we understand it, laid down in *De Molera v. Martin*, 120 Cal. 547, cited by counsel for respondent, and which case seems to be the authority most generally relied on in attacks upon the sufficiency of specifications to findings. That was an action in ejectment, and the court found on one single proposition—the ultimate fact—ownership of the land by plaintiff. On appeal this court held that a specification that the evidence was insufficient to justify such finding of ownership was bad, because it was simply a repetition of the ground designated in the notice of intention to move for a new trial, and not a specification of the particulars in which the evidence was insufficient, and in discussing the subject the court said: "If a finding is of an ultimate fact, which results from the establishment of several probative facts, these probative facts constitute the particulars from which the ultimate fact is drawn, and, if it is claimed that the evidence is insufficient to establish any of these probative facts, the particulars of such insufficiency should be specified in the statement. In *Kelly v. Mack*, 49 Cal. 523, an action brought to enforce a vendor's lien it was held that the specification 'the evidence is insufficient to show that plaintiff has a vendor's lien upon the land,' failed to comply with the statute, for the reason, that it was merely an averment in effect, that the cause of action set forth in the complaint was not sustained by the evidence. In the same case it was held that a specification that 'the evidence is insufficient to show that the plaintiff was the owner of the land at the time of sale,' was a sufficient specification of the particular in which the evidence failed to support the decision, since ownership of the land was one of the probative facts essential to entitle the plaintiff to a vendor's lien." Further on, but with

reference to the case then under consideration, the court continued: "The finding of the court that the plaintiff was the owner and entitled to the possession of the land was upon a consideration of all the evidence offered in support of her claim of ownership. This involved a consideration of the several particulars by which her ownership was to be established. Ownership, when regarded as a fact rather than as a conclusion of law, as in the finding herein, is the ultimate fact resulting from several probative facts to which the evidence in the case is directed. If the evidence is insufficient to sustain any of these probative facts, the particular facts which are not sustained by the evidence should be specified."

From this authority itself, we think the rule is deducible, as we have stated it, that where probative facts are found by the court, it is only necessary in questioning the sufficiency of the evidence to support them to call attention to the particular fact as found and challenge its support under evidence.

This is the view taken in the early case of *Strang v. Ryan*, 46 Cal. 41. This was also an action in ejectment. There the lower court made findings of a number of probative facts. On appeal from an order denying a new trial it was objected "that the statement on motion for a new trial contained no sufficient specification of the particulars wherein the evidence does not justify the findings and judgment." In overruling this objection the court said: "The first, second, third, fourth, sixth, seventh, eighth and thirteenth specifications are certainly not obnoxious to this objection. *Each of them specifies a particular fact found by the court which, it is alleged, was not supported by the evidence*, and, in respect to all the remaining specifications, *each of them points to a separate specific finding confined to one or two facts, and avers that it was not justified by the evidence*. We think this was a sufficient specification under section 195 of the Practice Act." To the same effect are *Knott v. Peden*, 84 Cal. 299, and *Dawson v. Schloss*, 93 Cal. 200.

In the still later cases of *American Type Founders' Co. v. Packer*, 130 Cal. 460, *Owen v. Pomona L. and W. Co.*, 131 Cal. 530, and *Standard Quicksilver Co. v. Habishaw*, 132 Cal. 124, the same rule is declared, if not broader, where

the finding of a probative fact, or a special finding, is attacked. The record in these latter cases shows that, as here, the findings challenged were findings of probative facts, and the specification as to each was simply that, as here, "the evidence was insufficient to justify the finding," followed by a recital of the particular finding, or part of the findings challenged.

In the first case the court held such a specification sufficient.

In the second case the court in *Bank* said (*Owen v. Pomona L. and W. Co.*, 131 Cal. 530): "With regard to the specifications the respondent makes the objection that they are not sufficient in substance or proper in form, and to this point cites the case of *De Molera v. Martin*, 120 Cal. 544. But the decision in that case has no application to the specifications here, which are as exact and detailed as they could be made in pointing out the particular findings and parts of findings, which it is claimed the evidence does not justify."

In the last case (*Standard Quicksilver Co. v. Habishaw*, 132 Cal. 124), the following language is used: "The specifications as to the sufficiency of the evidence to sustain the findings were sufficient. The particular findings objected to are pointed out, and attention is called by the plaintiff to its claim that neither of these findings is supported by the evidence."

It is further said in that case: "The purpose of the statute in requiring such specification is, as has been frequently said, that the opposing party may propose amendments to the statement, and thus cause it to contain all the evidence in support of the decision which he may deem pertinent, or relevant thereto . . . The object of requiring any specifications is to give notice to the opposing party of the grounds relied on for setting aside the decision; but if, under the notice which is given, the respondent has accomplished all which could have been accomplished under any notice, he is not in a position to object to any defect in the notice."

The specifications here, tested under any rule, gave the respondent all the notice necessary to advise him of the ground relied on; the facts found were pointed out, and he was noti-

fied that the appellant claimed that these special facts and special findings were not sustained by the evidence. The only object of a specification is to directly call the attention of the opposing party to the point upon which it is claimed that the evidence is insufficient. It is an easy matter for a respondent, if a proposed statement does not contain all the evidence as to any of the challenged findings, to have any evidence which he deems omitted and pertinent incorporated in the statement.

The rule laid down in *De Molera v. Martin*, 120 Cal. 544, if it was once capable of the stringent construction placed on it by successive respondents in appeals to this court, is now being relaxed in harmony with the more liberal view which will afford a hearing upon appeal where reasonable and ordinarily careful precautions have been taken to present specifications, rather than to defeat the right to be heard upon purely technical grounds. In this line are *Stuart v. Lord*, 138 Cal. 672; *Drathman v. Cohen*, 139 Cal. 310; and *Holmes v. Hoppe*, 140 Cal. 212.

If there is any intimation in decisions of this court, prior to these cases, in seeming conflict with this rule, it must give way to the clear expression of the rule upon this point, announced in these latter cases, and under these latter decisions. At least as far as the specifications in the case at bar are addressed to particular probative facts appearing in the findings, and to special findings thereunder, they are legally sufficient and correct, and the points made under them are properly before this court for consideration.

We proceed now to examine the sufficiency of these findings in the light of the evidence. Space will not permit of our setting them all forth *in extenso*, nor is it necessary to refer to all of them, even in a general way; an epitomization of a few of the main essential ones will be all that is necessary, because the insufficiency of the evidence to justify them is of the pith of the inquiry.

Neither have we made any preliminary statement of the facts, because in the reference which we shall make to the evidence, in examining the findings, an intelligent, though general history of the case will be found.

Among other findings challenged are those which find that

when Grover and Rosener made the conveyance of March 7, 1889, to Staacke (under which it is claimed that the trust was created) the grantors and plaintiff and Thomas Bell agreed that such deed should convey back to plaintiff the ten thousand acres of land in controversy, and that it was agreed between plaintiff and Thomas Bell that such conveyance should reconvey it to plaintiff according to his original title, such reconveyance to be made through the defendant Staacke.

And also the finding that it was not agreed by plaintiff, Thomas Bell, and Staacke, or either of them, at the time of the execution of such deed of March 7, 1889, that said Staacke should hold said ten thousand acres of land as security for the payment by plaintiff to said Thomas Bell of all sums of money theretofore, or thereafter, to be advanced to plaintiff by said Thomas Bell.

After a careful consideration of the evidence in the case we are satisfied that these findings, which are the main controlling ones in the case in favor of plaintiff, are not sustained by the evidence.

There is no question but that the premises were conveyed to Staacke, as trustee, by deed of March 7, 1889, and that the trustee claims no interest therein. There is no question as to the further fact, and the court so finds, that the plaintiff is indebted to the estate of Thomas Bell in the amount of over fifty-two thousand dollars. It is admitted that one of the purposes of the trust was to hold the title for plaintiff—of this there is no dispute on either side—but the question is, and was, as to whether or not the trustee also holds the title as security for the amount due by plaintiff to the estate of Thomas Bell. This is the controlling question in the case. The court below, in its opinion, said: "But all direct testimony on the material points, except that of plaintiff, is noticeably absent, and the letters, conversations, and acts of all the parties are as consistent with one theory as the other. . . . The testimony of John S. Bell, the plaintiff, while if contradicted or inconsistent with the circumstances, would be of much less value than that of a disinterested witness, is still entitled to due consideration, and, where totally uncontradicted, reasonable and consistent

with all other facts, should be sufficient upon which to base a finding."

The court, therefore, appears to have placed considerable, if not main stress upon the fact, that plaintiff was not contradicted as to certain statements concerning the purposes and objects of the trust. While the evidence is too voluminous to be discussed in detail, it is necessary to state a few salient features of it, in order to show the reasons which have impelled us to arrive at a conclusion different from that of the trial court. The plaintiff is a nephew of Thomas Bell, deceased, who, during his lifetime, looked after plaintiff and his family—the plaintiff residing in Santa Barbara, Thomas Bell in San Francisco—and showed much affection and solicitude for them, and expended large sums of money each year for their maintenance. Plaintiff was improvident, showed no business ability, and was always dependent upon his deceased uncle for his support. As early as 1874 deceased gave and conveyed to plaintiff a tract of land containing fourteen thousand acres, being the four-thousand-acre tract and the ten-thousand-acre tract described in the amended complaint, situate in one body in the northern portion of Santa Barbara County. Plaintiff failed to support himself and family from the income of the land, but deceased, from time to time, made loans and advances to him until, in the year 1885, the indebtedness of plaintiff to deceased amounted to fifty thousand dollars. They then had a settlement, and plaintiff, in payment of said indebtedness conveyed to deceased four thousand acres from the tract, which was thereafter known as the "four-thousand-acre tract," retaining the balance, which was thereafter known as the "ten-thousand-acre tract." On the twenty-third day of August, 1887, the plaintiff and deceased made a sale of both tracts of land to one Grover, for three hundred and fifty thousand dollars, one fifth of which was paid in cash. The four-thousand-acre tract of deceased went into the sale at eighty thousand dollars, and the ten-thousand-acre tract of plaintiff at two hundred and seventy thousand dollars. The deferred payments for Thomas Bell's tracts were evidenced by four promissory notes of Grover, each for sixteen thousand dollars, payable to Thomas Bell, and secured by mortgage on the four thousand acres. The de-

ferred payments for plaintiff's tract were evidenced by four promissory notes for fifty-four thousand dollars each by Grover, payable to Thomas Bell, and secured by mortgage on the ten-thousand-acre tract. At the time of this sale plaintiff had become again largely indebted to Thomas Bell, and by a verbal agreement the cash payments, the notes for the deferred payments on the ten-thousand-acre tract, and the mortgage to secure the same, were made direct to Thomas Bell, plaintiff's portion of the cash being credited on his indebtedness, leaving the balance still due and owing by plaintiff to Thomas Bell of \$25,529. Four days after this sale plaintiff and Thomas Bell entered into a written agreement with each other, which, after reciting the facts as to the sale, the cash payment and its application, the giving of the notes and mortgage, and the balance of \$25,529, still due Thomas Bell, provided "that Thomas Bell should hold said notes and mortgage for \$216,000 until he should be repaid all present and future loans and advances which he might see fit to make to said John S. Bell, with interest from date of making the same, after which he should on demand assign the same to said John S. Bell." There is no doubt as to what the parties intended up to the time of this written agreement, and as to what was intended by it. The acts, conduct, and writings, up to this time, clearly show that Thomas Bell was to hold the notes and mortgage of Grover, given for the purchase price of plaintiff's land, as security for all sums due from, and to be advanced to him. They are not consistent with any other or different theory, nor did the parties differ up to this time as to the understanding and agreement. It was expressed that Thomas Bell should hold the evidence of indebtedness for the balance due plaintiff, on account of the sale of his land, in trust to secure all indebtedness due and to become due by plaintiff. Upon the faith and strength of this arrangement, the deceased continued to make advances and to support plaintiff and his family, although constantly advising plaintiff to be more careful in his expenditures.

After the purchase by Grover, he conveyed an interest in the premises, subject, of course, to the mortgages, to one Rosener. Grover and Rosener were unable to make payments as provided in the notes and mortgages, and Thomas

Bell commenced suits to foreclose. While the foreclosure suits were pending, the plaintiff and Thomas Bell orally agreed with Grover and Rosener that, in consideration of a proper deed of conveyance of the premises, they would release Rosener from the obligations of said notes and mortgages. In pursuance of this agreement a deed was accordingly made to Staacke, the confidential clerk of Thomas Bell, on the seventh day of March, 1889, which is the conveyance now in question. In consideration of this deed of grant to Staacke, Thomas Bell delivered to said Grover all said notes and mortgages, released the mortgages of record, and dismissed the suits of foreclosure. Grover and Rosener in making the deed to Staacke acted with the consent, and at the request, of both plaintiff and Thomas Bell. In fact, the consent of plaintiff would not appear to have been necessary, as Thomas Bell held the legal title and the possession of the property which (the notes and mortgage) constituted the consideration for the deed. No suggestion was made by plaintiff that the deed was to free his land from the lien of Thomas Bell for indebtedness and for further advances. Let us see, then, from the acts and conduct of the parties, their interpretation and understanding of the trust. Grover and Rosener, after making the deed, immediately delivered possession of the property to Staacke. Plaintiff made no objection to the surrender of possession to Staacke, and one Hathaway was employed as superintendent of both tracts in common. As such superintendent he managed the property and remained in possession until October 14, 1892, and accounted regularly to Thomas Bell during all this time for the rents and profits of both tracts, the accounts of the two tracts being kept separately. Thomas Bell continued to make advances to plaintiff as he had done before, and credited the net proceeds of the rents from the ten-thousand-acre tract to plaintiff. In the correspondence between the parties after the deed to Staacke, Thomas Bell often referred to the ten-thousand-acre tract as belonging to plaintiff, and as being held as security for the indebtedness to him. Although plaintiff wrote to Thomas Bell frequently, it does not appear that he ever objected to or denied the claims or statements of Thomas Bell as to the land being held as security. Thomas Bell rendered yearly to plaintiff a state-

ment of his account, giving credit for the rents and profits of plaintiff's land, and charging him with expenses, taxes, and moneys loaned, which statements were always acknowledged by plaintiff in writing to be correct. The balance was always largely in favor of Thomas Bell, and continually increased. As a sample of the letters of Thomas Bell to plaintiff, showing the understanding that the land was held as security, a few extracts may be given. In a letter dated March 27, 1889, written after the date of the deed from Grover and Rosener to Staacke, and while some negotiations were pending as to granting Rosener an option to purchase the land, Thomas Bell said: "You must try to curtail these heavy expenses; you will soon owe me more than the 10,000 acres are worth in my opinion. If we had the matter arranged with Rosener, the 10,000 acres could be deeded to you, and you could borrow fifty or sixty thousand on it to pay me," clearly indicative of the fact that a conveyance to John Bell would only be permitted on condition that he should, by mortgaging it, repay the indebtedness owing to Thomas Bell. In a letter dated July 17, 1889, he wrote: "I inclose your account up to the 30th of June, showing that you owe me \$74,633.33. This is perfectly frightful; if you go on in this way the value of the land will be eaten up." In a letter dated September 7, 1889, he wrote: "The draft for \$500 turned up to-day. I told you that you must not draw more than \$300 for family allowance. This must suffice. Your account has run up pretty nearly to the value of the ranch. . . . I am determined to stop this expenditure, for you would soon run up your account to the full value of the land—so in future I will only advance \$300 per month, and this must be paid to your wife—she must sign the draft, otherwise I will not pay it." On November 2, 1889, plaintiff wrote to Thomas Bell, asking for \$200 in addition to the \$300 for November for his wife. In a letter in answer to this, dated November 8, 1889, Thomas Bell wrote to plaintiff, and in the letter, after again admonishing plaintiff, said: "This must be stopped, and you had better tell your wife how you stand. Tell her how much you owe me, and how near it is to the value of the land." In a letter dated June 9, 1890, Thomas Bell wrote: "I opened the inclosed telegram, and found it to be from madame, on the question of

family allowance. I wish you would tell her your position, that your debt to me has run up to \$82,000 from \$25,000, which it was on August 27, 1887. Explain to her that it is absolutely necessary to curtail expenses in accordance with your means. I do not really believe your land is worth more than ten dollars per acre, so that what you owe me is coming pretty close to that." There are many other letters of like character. In December, 1891, the indebtedness of plaintiff to Thomas Bell was over \$100,000, and after writing and informing plaintiff, Thomas Bell borrowed \$60,000 from the San Francisco Savings Union and caused Staacke to give the bank a deed of trust on both tracts of land to secure it. The money, less the expenses of the loan, was placed to the credit of plaintiff, and he was fully informed of the transaction. He made no objection, but continued to draw money from Thomas Bell up to the time of his death, in October, 1892. Plaintiff never, by word or act, denied the claims of Thomas Bell that the land was held in trust as security until long after the death of Bell. After the death of Thomas Bell the plaintiff presented a claim against the estate, claiming \$360 per month, which he alleged was agreed to be paid him for the support of his family out of the rents, issues, and profits of the ranch. This claim was rejected by the executors, and this action was commenced in March, 1893.

In the original complaint, which was verified, plaintiff alleged the conveyance to Staacke; the fact that Thomas Bell was to have possession of the ranch, receive the rents, issues, and profits thereof, and pay to plaintiff three hundred and sixty dollars per month, independent of the rents or profits. In this original complaint, which was introduced in evidence, plaintiff alleged and swore, "*that it was understood and agreed between said Thomas Bell and plaintiff that the said monthly allowance should continue until the sale of said property as aforesaid, and should be, with the other amounts theretofore advanced and to be thereafter advanced by said Thomas Bell to plaintiff, charged to plaintiff, to be reimbursed by him to said Thomas Bell out of the proceeds of sale.*" Thus, we have the acts and conduct of the parties up to the time of

Bell's death, and the sworn statement of the plaintiff, at the time he commenced this action, all tending to show that the deed was in lieu of the notes and mortgage, and intended as security for the indebtedness due, and to become due, to Thomas Bell. The contemporaneous and practical construction of a contract by the parties is strong evidence as to its meaning if its terms are equivocal. "Tell me," said Lord Chancellor Sugden, "what you have done under a deed, and I will tell you what the deed means." (*Attorney-General v. Drummond*, 1 Dru. & Walsh, 353; 2 H. L. Cas. 837. See *Keith v. Electrical Engineering Co.*, 136 Cal. 181, and cases cited.) After the original complaint was filed and the case had been long pending, the plaintiff for some reason changed his attorney, and the theory of the case was changed by amending the complaint and claiming that the deed to Staacke was in trust for plaintiff, and not as security for any of the plaintiff's indebtedness to Thomas Bell. Plaintiff had the right, probably, to so amend his complaint and change his theory, but this did not change the effect to be given to a solemn statement of the fact when relying upon his previous theory. And where the court below seems to have based its finding entirely upon the evidence of plaintiff, the fact stated in the former verified complaint becomes very material in determining whether or not the abstract statement of plaintiff on this trial, under his latest theory, shall prevail as against the mass of facts and circumstances herein narrated. The whole record must be looked to in order to ascertain the truth. So viewing the record, we do not think there was any substantial conflict. This was the view expressed by the lower court upon the first trial, for, in the opinion, it is said: "The deed to Staacke of the ten thousand-acre tract was in consideration of two hundred and sixteen thousand dollars in notes held and payable to Thomas Bell. *Prima facie*, he paid the whole consideration. But by the agreement of August 27, 1887, it clearly appears that John S. Bell has an interest in that consideration,—that Thomas Bell holds said notes, not simply as pledgee, but that he holds them in trust as well, for the interest of both himself and John S. Bell. When he changes the security, John S. Bell's interest follows the prop-

erty." It is equally true that Thomas Bell's interest followed the property. He changed the notes and mortgage which were pledged to him into land by consent of the owner of the notes and mortgages. He took the land in lieu of the notes and mortgage, and it became subject to the written agreement made as to the notes and mortgages. (*Price v. Reeves*, 38 Cal. 457; *Roach v. Caraffa*, 85 Cal. 437; *Barker v. Hurley*, 132 Cal. 28.) The rights of Thomas Bell in and to the trust property were declared under the written instrument of August 27, 1887. It was the duty of Thomas Bell, as holder or pledgee of the promissory notes and mortgages, to collect them when due. He did commence foreclosure proceedings for the purpose of collecting them. If he had obtained title to the land under the foreclosure, the title would have been held by him as security under the written agreement made August 27, 1887. The title was conveyed by consent of plaintiff to Staacke, and thus acquired without the machinery of foreclosure. Thomas Bell continued to hold the land in the name of his confidential clerk, in lieu of the notes and mortgages. He continued to hold possession of the land and collect the rents and profits. He was doing so for the benefit of plaintiff, and upon the faith of the title thus held he made advances for years and years for the support of plaintiff and his family. Plaintiff knew the condition of the title, the fact that Thomas Bell claimed it as security, and that upon the faith of such claim the advances were made to him. He was informed time and time again that Thomas Bell was making the advances on the property. He never by word or act repudiated such claim by Thomas Bell, but insisted upon the advances being made. He will now be held to the agreement as he understood it, as he acquiesced in it for years, as he believed it to exist at the time he presented his claim against the estate of Thomas Bell and at the time he commenced his action.

The alleged errors of law complained of consist of objections sustained to two questions propounded by the attorney for appellants to the defendant Staacke on his direct examination. One was an inquiry whether James Wheeler, attorney for Thomas Bell, when he delivered the deed from Grover and Rosener to the witness, made any remark as to the purpose of its execution. The ruling sustaining the ob-

jection was correct. The conversation referred to occurred nearly three months after the deed had been executed, and there was no showing that James Wheeler was the attorney, or agent, or authorized to act or speak for plaintiff, or that plaintiff was present when the conversation referred to was had.

A question of the same tenor was asked the witness with reference to a conversation with Thomas Bell about the same time, and was properly sustained, as there was no showing that plaintiff was present.

The letter from Staacke to Louis James was not admissible on any principle, and the court properly excluded it. It was a private letter, written after the death of Thomas Bell, and plaintiff had never seen or known of its existence.

For the reasons given, the order denying the motion for a new trial is reversed, and the cause remanded.

McFarland, J., concurred.

SHAW, J., concurring.—I concur in the opinion of Justice Lorigan. I desire, in addition, to say, plainly and unequivocally, that it is entirely immaterial whether a specification of a particular wherein the evidence is claimed to be insufficient to justify a verdict or decision points to a probative fact or an ultimate fact. In either case the specification is sufficient as to the particular fact pointed out, and challenges the sufficiency of the evidence to sustain it.

Angellotti, J., and Henshaw, J., concurred with Shaw, J.

The following opinion was rendered by the court in Bank on rehearing, December 28, 1903.

THE COURT.—The petition for rehearing is denied, but the judgment heretofore rendered herein in this court is hereby amended so as to read as follows: "The order denying the motion for a new trial is reversed except as to the issues covered by the 'twenty-third' paragraph of the findings, and the following portion of the 'twenty-second' paragraph of the findings, to wit: 'That John S. Bell was indebted to Thomas Bell on the sixteenth day of October, 1892, the day

when Thomas Bell died, on account of advances of money and interest thereon, in the sum of \$52,120.15,' and paragraph '4' of the conclusions of law, and except as to the issues covered by the 'additional findings,' and cause remanded for new trial of all other issues."

[Crim. No. 1018. In Bank.—November 30, 1903.]

Ex Parte F. W. BRAUN, on Habeas Corpus.

MUNICIPAL CHARTER—TAXATION FOR REVENUE—"MUNICIPAL AFFAIRS"—CONSTITUTIONAL LAW—POWER OF LEGISLATURE.—A municipal charter framed under section 8 of article XI of the constitution, conferring upon it the power of taxation for purposes of revenue, makes such power a "municipal affair," within the meaning of section 6 of that article, making an exception of "municipal affairs" to the operation of general laws; and such power cannot be withdrawn or abrogated by the legislature. [Beatty, C. J., and Lorigan, J., dissenting.]

ID.—OPERATION OF POLITICAL CODE—TAXATION FOR REGULATION ONLY.—Section 3366 of the Political Code, enacted in 1901, providing that "boards of supervisors of the counties of the state, and the legislative bodies of the incorporated cities and towns therein, shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license all and every kind of business not prohibited by law," etc., is not applicable to a city governed by a charter framed under the constitution, where such charter confers upon its legislative body the power to impose and collect license-taxes for revenue purposes. [Beatty, C. J., and Lorigan, J., dissenting.]

ID.—SOURCE OF CHARTER POWER OF TAXATION.—The power of cities under freehold charters to raise money by taxation for municipal purposes does not find its source in any grant by the legislature, but has been directly granted by the people of the state by the provisions of the constitution.

HABEAS CORPUS to test the validity of an ordinance of the City of Los Angeles, under which petitioner was convicted in the Police Court. H. C. Austin, Police Judge. Charles Elton, Chief of Police, Respondent.

The facts are stated in the opinion of the court.

Lawler, Allen & Van Dyke, for Petitioner.

Christopher C. Wright, Huey & Beach, Frank G. Henderson, and George S. Hupp, *Amici Curiae*.

W. S. Mathews, City Attorney, for Respondent.

ANGELLOTTI, J.—Petitioner was taken into custody under a warrant issued upon a complaint filed in the police court of the city of Los Angeles, charging that he, on the seventh day of April, A. D. 1903, in said city, “did willfully and unlawfully conduct, manage, and carry on the business of a wholesale liquor dealer without first having procured a license from the city of Los Angeles so to do, . . . contrary to the forms of the ordinances and resolutions adopted and approved by the municipal authorities of said city.” Having been brought before said police court under said warrant, he was committed to the custody of the chief of police of said city pending further proceedings in the case, and being now detained by said chief of police under said warrant and commitment, seeks his discharge on *habeas corpus*.

The ordinance of the city of Los Angeles upon which the prosecution is based is entitled: “An ordinance providing for licensing and regulating the carrying on of certain professions, trades, callings, and occupations carried on within the limits of the city of Los Angeles,” and was enacted February 28, 1903. It is devoid of regulating provisions, being devoted entirely to the imposition of a license-tax upon various trades and occupations and the collection thereof. It imposes a license-tax upon a great majority of callings and occupations, and in several instances the amount of tax is based upon the amount of business transacted. It includes numerous callings which are in no degree subject to regulation. By its terms, a license-tax of sixty dollars per month is imposed on every person, firm, or corporation conducting, managing, or carrying on the business of a wholesale liquor dealer, and a wholesale liquor establishment is defined by the ordinance to be any place where spirituous, vinous, malt, or mixed intoxicating liquors are sold, served, or given away in quan-

titles of not less than one fifth of a gallon, and not to be drunk upon the premises.

Taking into consideration the absence of regulatory provisions, the amounts of the several taxes imposed, and the nature of many of the subjects of taxation named in the ordinance, including the particular business here involved, it is very clear that the license-tax upon the business alleged to be conducted by petitioner was imposed solely for the purpose of raising revenue. (See *Town of Santa Monica v. Guidinger*, 137 Cal. 658.) This does not appear to be questioned by the respondent.

It is also clear, under the decisions of this court, that the freeholders' charter of the city, which was approved by the legislature in 1889, must be construed as conferring upon the municipality the authority to license all occupations and callings carried on within the city, for the purpose of revenue, as well as regulation. (Charter, sec. 2, subd. 13; Stats. 1889, p. 456.) The case, in this respect, is not distinguishable to petitioner's advantage from that of *Ex parte Frank*, 52 Cal. 606,¹ and that of *City of San Jose v. San Jose etc. R. R. Co.*, 53 Cal. 475 (480), wherein substantially similar charter provisions were construed. Subdivision 13 of section 2 of the Los Angeles charter, taken as a whole, clearly contemplates the collection of revenue licenses. It must also be remembered that at the time of the adoption of said charter, municipal corporations and counties were allowed to license for revenue. The ordinance in question was enacted by the mayor and council of Los Angeles in the exercise of the power to license for revenue, conferred by the city charter, and we see no reason to question its validity, if the power of the municipality to license for revenue purposes has not been taken away by the legislature of the state. The state legislature in 1901 added a new section to the Political Code, providing that "Boards of supervisors of the counties of the state, and the legislative bodies of the incorporated cities and towns therein, shall, *in the exercise of their police powers, and for the purpose of regulation*, as herein provided, *and not otherwise*, have power to license all and every kind of business not prohibited by law," etc. (Pol. Code, sec. 3366.)

¹ 128 Am. Rep. 642.

The act adding this section to the Political Code has been held to be constitutional, and in a case wherein this court held that the section abrogated the power of county boards of supervisors to issue licenses for revenue purposes, speaking through Mr. Justice Garoutte, it said: "Every feature of this act of 1901 indicates a plain purpose upon the part of the legislature to restrict the licensing power of boards of supervisors and city councils to matters of regulation alone." (*Ex parte Pfirrmann*, 134 Cal. 143, 148.) That the power of municipalities incorporated under the General Municipal Corporation Act to impose a license-tax for revenue was abrogated by such section 3366 was held in *City of Sonora v. Curtin*, 137 Cal. 583, and *Town of Santa Monica v. Guidinger*, 137 Cal. 658. Section 3366 of the Political Code, enacted in 1901, is unquestionably a general law, and operative so far as the legislature had the power to make it so, upon every county and municipality within the state. It is contended by respondent that the state legislature could not deprive a municipality, existing under a freeholders' charter, of the power conferred by such charter to impose a license-tax for revenue purposes. It is admitted that under the provisions of section 6 of article XI of the constitution, as amended in 1896, all cities and towns and charters thereof framed or adopted by authority of the constitution, are subject to and controlled by general laws, "except in municipal affairs." But it is contended that the collection of a license-tax for revenue is, under the provisions of the Los Angeles charter, a "municipal affair," and that, therefore, the charter provisions are paramount. This contention presents the real question in the case. Admittedly, the provisions of a charter framed under and in accordance with the provisions of section 8 of article XI of the constitution, and approved by the legislature as therein provided, are, by virtue of the amendment of 1896 to section 6 of article XI of the constitution, so far as "municipal affairs" are concerned, supreme and beyond the reach of legislative enactment.

It is contended at the outset by petitioner that this question was necessarily involved in the cases of *City of Sonora v. Curtin*, 137 Cal. 583, and *Town of Santa Monica v. Guidinger*, 137 Cal. 658, as section 6 of article XI of the constitution makes no distinction in this respect between cities and

towns incorporated under the General Municipal Corporation Act and those operating under freeholders' charters. It is, however, manifest that there is a distinction between these two classes, and that the constitutional amendment of 1896 to such section in no wise affects cities and towns incorporated under the General Municipal Corporation Act. Such cities and towns were created under general laws, which general laws may at any time be altered, amended, or repealed by the legislature, and the amendment of 1896 has not in the slightest degree impaired the power of the legislature in this respect. The only limitation on the power of the legislature in regard to such cities and towns is, that it must not enact "special laws" in regard thereto. They have always been and still are subject to and controlled by general laws in municipal affairs. This distinction was recognized in *Morton v. Broderick*, 118 Cal. 474, where the court, through Mr. Justice Henshaw, after stating the reason for the amendment as follows: "It had been believed by the legislature and by the people that it would be wiser to relieve *charters of cities* from the operation of general laws affecting municipal affairs, lest otherwise there would be danger of the charter provisions being entirely frittered away," said: "Under the constitutional amendment such acts" (speaking of an act held by the court to deal with municipal affairs). "*now* apply only to cities . . . which have organized under the general scheme embraced in the Municipal Corporation Act." The *Sonora* and *Santa Monica* cases did not, therefore, involve the question here presented.

The meaning of the term "municipal affairs," as these words are used in the constitutional amendment of 1896, has been considered in several decisions of this court. In discussing the effect of this amendment, this court has always recognized the reason that impelled its adoption. After much public discussion, and upon an exhaustive consideration of the question, it had been decided by this court that the legislature, prior to this amendment, had power, by general laws, to supersede, or take away, without the consent of the municipality, the powers conferred upon it by a special charter. (*Thomason v. Ashworth*, 73 Cal. 73; *People v. Henshaw*, 76 Cal. 436; *Davies v. Los Angeles*, 86 Cal. 37.) These decisions had demonstrated that the power given by the consti-

tution to cities to frame charters for their own government for the purpose, as was said in *People v. Hoge*, 55 Cal. 612, 618, of emancipating them from the authority and control formerly exercised over them by the legislature in municipal matters, were unavailing if such charters could at once be superseded by any general legislative enactment. Under these circumstances, the section of the constitution providing that all cities and towns and the charters thereof should be subject to and controlled by general laws was amended by the addition of the words "except in municipal affairs." Whatever conflict may be found in the opinions of this court as to the precise meaning of the term, it has always been conceded by all the justices that the object of the amendment was to secure to the municipality that had, under the provisions of the constitution, adopted a charter for its own government, the maintenance of its charter provisions in municipal matters, and to deprive the legislature of the power, by laws general in form, to interfere in the government and management of the municipality. It was enacted upon the principle, as stated by Mr. Justice Garoutte in *Fragley v. Phelan*, 126 Cal. 383, 387, "that the municipality itself knew better what it wanted and needed than did the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs." The words used in the amendment are words of wide import, broad enough to include all powers appropriate for a municipality to possess and actually conferred upon it by the sovereign power. The collection of a license-tax for revenue purposes is a well-recognized exercise of the taxing power. (See *People v. Martin*, 60 Cal. 153.) That the power of taxation is a power appropriate for a municipality to possess is too obvious to merit discussion. As was said by Mr. Justice Field in *United States v. New Orleans*, 98 U. S. 381, "A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose." It was further said in that case that: "When such a corporation is created, the power of taxation is vested in it, as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accomplishment of these purposes, its author-

ities, however limited the corporation, must have power to raise money and control its expenditure." When the power to impose taxes is conferred upon a municipality to enable it to raise the money essential for the purposes for which it is created, that power necessarily becomes a municipal affair. As was said of other powers and duties in *People v. Williamson*, 135 Cal. 415: "They are peculiarly for the inhabitants of the city, and not directly for the benefit of any one else." It is confined in operation to the city of Los Angeles, and affects none but its citizens and taxpayers and those doing business within its limits. Without it, the municipality cannot exist, and the municipality alone is directly concerned in its preservation. That taxation for *municipal purposes*, whether by assessments upon property or a tax upon business, is a purely municipal matter, is expressly recognized by section 10 of article XI of the constitution, which prohibits the legislature from imposing taxes upon municipal corporations, or the inhabitants or property thereof, for *municipal purposes*, and provides that the legislature may vest in the corporate authorities thereof, *the power* to assess and collect taxes for such purposes. It was said in *City and County of San Francisco v. Liverpool, L. and G. Ins. Co.*, 74 Cal. 113, 124,¹ that the purpose of this section is to relegate to the local boards the whole subject of county and municipal taxes for local purposes, and that the legislature has no power to impose any tax whatever within those territories for local purposes. It was further said therein, speaking of a tax attempted to be imposed on insurance companies by the legislature for the benefit of fire departments of counties and cities and counties, which was held to be clearly a municipal purpose, that the fact that the state at large has an interest in the efficiency of the departments does not render the end any less a municipal one. The court said also: "The people of the state have *such* an interest in all the police powers granted to these municipalities. And, even if the state may exercise a concurrent supervision over a subject, still, so far as actually controlled by the local board, it is a matter of municipal concern." (See, also, *People v. Martin*, 60 Cal. 153.) The

¹ 5 Am. St. Rep. 425.

case of *Alexander v. City of Elizabeth*, 56 N. J. L. 71, is in point upon this question of municipal affairs. The constitution of New Jersey provided that the legislature should not pass private, local, or special laws regulating the internal affairs of towns and counties. The legislature by special act attempted to provide for the licensing and regulating of race-courses by municipal authorities, and it was held that while, primarily, racing within the state was not a question which concerned the internal affairs of towns and counties, "a statute which confers powers upon the municipality to restrict, limit, or extend racing is a statute which does undoubtedly affect the internal affairs of such towns within the meaning of the constitution." The court further said: "It becomes a matter of the internal regulation of the affairs of the municipality by force of the statute, and it cannot be claimed, so far as the statute is concerned, to be a question any longer of state policy, but a matter concerning the internal affairs of the municipality to which it applies. It becomes the power of the municipality." It is of course true that the local power of taxation, like all other local powers, must have its origin in a grant by the state, and that it may at all times be controlled by the sovereign power. But it does not follow that the legislative department of the state may so control it. In the absence of constitutional provisions relating to the subject, the legislative department would necessarily have unlimited sway, and could, for the state, confer, modify, or withdraw the power and prescribe such regulations as it saw fit for its exercise. The state constitution is, however, the highest expression of the will of the people of the state, and so far as it speaks, represents the state. So, where, as here, a power is given in the constitutional method by special charter, and not by direct legislative enactment, it can be withdrawn only by amendment to the charter in the manner provided by the constitution. It is only when local power is not conferred by the state constitution, that legislative enactment is essential to its existence (Cooley on Taxation, 678), or is of adequate force to withdraw it.

The power of cities operating under freeholders' charters to raise money by taxation for municipal purposes does not

find its source in any grant by the legislature. There is no enactment of the legislature purporting to vest such authority in such cities. Such power has been directly granted by the people of the state by the provisions of the state constitution. It was held by this court in *Security Savings Bank etc. Co. v. Hinton*, 97 Cal. 214, where the question was directly involved, that the authority given by the constitution to certain cities to frame and adopt "a charter for its own government" which "shall become the organic law thereof" is comprehensive enough to authorize a provision such as that contained in the charter of the city of Los Angeles providing for taxation for municipal purposes. It is true that the particular provision of the charter there involved was that relating to taxation on real and personal property, but that is immaterial to the particular question under discussion. There was at the time of the adoption of the charter no general law of the state prohibiting the imposition of a license-tax for revenue, and the same constitutional authority that sanctioned the provision for a property tax authorized the provisions for the revenue license, a method of raising money for local purposes then obtaining generally in the counties and cities of the state. Those provisions when legally incorporated in the charter constituted a grant from the state of the power to impose a license-tax for revenue purposes. This power, being so granted by the state to the municipality for municipal purposes, became a "municipal affair" of the city of Los Angeles within the meaning of those words as used in the constitution, and the legislature was without authority to withdraw or modify such power. There is absolutely no basis for the argument of counsel for petitioner that the amendment does not cover cases where the legislature by general laws withdraws powers from or grants powers to a municipality. If the local governmental powers bestowed by the constitution through the charter may be taken away by the legislature, it will readily be seen that the amendment of 1896 has accomplished nothing. It has already been attempted to be shown that when a power is conferred upon a municipality for municipal purposes that power becomes a municipal affair. As was said by the supreme court of New Jersey in *Sutterly v. Camden Common Pleas*, 41 N. J. L. 495, "To repeal a section of the city charter which confers some power of

government, or one restraining or limiting the exercise of some other, may be as effectual an interference with and regulation of its internal affairs as a law setting up within the municipality some new adjunct to the local government, or one which introduces radical change in the instruments and methods of administration."

We have carefully examined the decisions of this court upon this question of "municipal affairs," and find nothing therein inconsistent with the views herein expressed. *Ex parte Pfirrmann*, 134 Cal. 143, dealt solely with the rights of counties to collect such a tax, and what is said therein as to the right of the legislature to say in what manner the taxing power *granted by it* shall be exercised has reference only to counties and such cities and towns as derive their power from the legislature.

Our conclusions are, therefore, that the power to collect a license-tax for revenue purposes was actually conferred upon the city of Los Angeles for municipal purposes by the charter framed for its government, under the provisions of section 8 of article XI of the constitution, and that such power is a "municipal affair" within the meaning of those words as used in section 6 of article XI of the constitution, and cannot be withdrawn or abrogated by the legislature. Section 3366 of the Political Code is therefore inapplicable to that city.

It follows that the writ issued must be discharged and the petitioner remanded, and it is so ordered.

Shaw, J., and Henshaw, J., concurred.

McFARLAND, J., concurring.—I concur in the judgment remanding the petitioner and discharging the writ, and in most that is said in the opinion of Mr. Justice Angellotti. I am reluctantly constrained to conclude that, by the amendment to the constitution in question, the people of the state, moved by a temporary impulse (not yet entirely abated) to carry the notion of what is called "local self-government" to extremes, have taken away from the state an important part of that peculiar attribute of sovereignty, the taxing power, and given it to all the municipalities, great and small, which are now organized, or which may be hereafter organized, under freeholders' charters. It is difficult to realize that the people

of the state, through their legislature, have no longer the power to say that a license-tax—a tax upon the right to do business, a tax upon capacity—is unjust, unequal, and oppressive, and should not be tolerated anywhere within the state; but we think that such is now the law.

1. Section 13 of article II of the charter of Los Angeles, construing all its language together, clearly, it seems to me, gives power to the city to license for revenue.

2. The section of the constitution in question uses the loose, indelible, wild words, "municipal affairs," and imposes upon the courts the almost impossible duty of saying what they mean. This court has not undertaken, and probably will not undertake, to give a general definition of the words, so as to bring all future cases within the two categories of what is and what is not a municipal affair. A few cases involving the question have arisen, and in each of such cases the court has merely determined, as it was compelled to determine, whether the thing there involved was or was not within the indeterminate constitutional words. And, no doubt, in the future each case involving the question will be decided on its own facts, without an attempt at generalization. Now, in the case at bar, the city having the power to impose license taxes for revenue, and the taxes having been levied for the support of a municipal government, and the ordinance applying only to the territory of the city and the inhabitants thereof, and no other person being affected thereby, I cannot see how to hold that the matter is not a municipal affair, and am driven to the conclusion that it would be an usurpation of power to so hold. Of course, whether or not the people of the state were wise in thus yielding up so important a power is not a judicial question.

Van Dyke, J., being disqualified, did not participate.

BEATTY, C. J., dissenting.—I dissent. The decision of the court is rested, and necessarily depends, upon the construction given to the phrase "municipal affairs," which by the amendment of 1896 was added to section 6 of article XI of the constitution. That construction is thus stated in the principal opinion: "When a power is conferred upon a municipality for municipal purposes, that power becomes a municipi-

pal affair." It is to be observed of this construction that until it can be shown that any power is ever conferred upon, or exercised by, a municipality for other than municipal purposes the definition of a municipal affair gains nothing in point of clarity or precision by the inclusion of the words "for municipal purposes." We have no concern with powers that cannot be exercised, and since the powers of a municipality, if exercised at all, must be exercised exclusively "for municipal purposes," these words do not qualify the rest of the definition. With or without them, it means the same thing,—viz., that a power once conferred upon a municipality becomes, *ipso facto*, a municipal affair within the meaning of this section of the constitution, and is for all future time exempt from any control by act of the legislature, no matter how general in its intended operation upon all persons in every part of the state.

The conclusion which results from this view is aptly stated in the concurring opinion of Justice McFarland, who is "reluctantly constrained to conclude that, by the amendment of the constitution in question, the people of the state, moved by temporary impulse (not yet entirely abated) to carry the notion of what is called 'local self-government' to extremes, have taken away from the state an important part of that popular attribute of sovereignty, the taxing power, and given it to all the municipalities, great and small, which are now organized, or which may be hereafter organized, under freeholders' charters. It is difficult to realize that the people of the state, through their legislature, have no longer the power to say that a license-tax—a tax upon the right to do business, a tax upon capacity—is unjust, unequal, and oppressive, and should not be tolerated anywhere within the state; but we think that such is now the law." I should arrive at the same conclusion with the same reluctance if I felt constrained to adopt it. But I do not. The sole purpose of the amendment to section 6 of article XI of the constitution was to restore to the fundamental law what had been construed out of it by this court in a series of decisions of which *Thomason v. Ashworth*, 73 Cal. 73, is the most conspicuous example. By that section the legislature had been prohibited from creating municipal corporations, as they had theretofore been created by special laws. In place of such special laws they were

commanded to provide for the incorporation and organization of cities and towns by general laws. It was provided, further, that cities and towns theretofore organized (under special charters) might reorganize under such general laws whenever a majority of their electors so decided, and that all cities and towns theretofore organized (by special laws) or thereafter to be organized (under the general incorporation laws or through the action of a board of freeholders), and all charters thereof, should be controlled by and subject to general laws. From the most casual reading of the section it was plain that, unless the frames of the constitution intended to contradict themselves in the short space of a dozen lines, they did not mean to include among the general laws which would control the provisions of special charters the general laws for the incorporation and organization of municipal incorporations. It was accordingly held, in a maturely considered case decided shortly after the new constitution took effect, that the Consolidation Act, which constituted the charter of San Francisco, was not superseded or controlled by what was known as the McClure charter. (*Desmond v. Dunn*, 55 Cal. 242.) I am not aware that the soundness of that decision has ever been directly impeached, and certainly it is not to be questioned at the present day. Nevertheless, the court in *Thomason v. Ashworth*, 73 Cal. 73, by a bare majority, held that the charter of San Francisco, and every special charter granted by the state, was controlled by the Street Improvement Law, and this notwithstanding the dissenting opinion of Justice McKinstry,—concurred in by Justice Sharpstein,—in which it was demonstrated with irresistible logic that the Street Improvement Act, which had no operation or application outside of incorporated cities and towns, was nothing but a part of, or an amendment to, the general law for the incorporation of cities and towns, which it had been theretofore decided, in accordance with the plain intent of the constitution, would not control special charters. The result of this decision was to leave the legislature free to override *ad libitum* the provisions of all special charters by the simple device of enacting statutes which were general in no other sense than that they applied generally to all municipal cor-

porations, and which were not a part of the Municipal Incorporation Law only because they omitted to so style themselves in their titles.

This was the mischief, and the whole mischief, which the people intended to remedy when they inserted in the constitution the ambiguous and ill-chosen phrase "except in municipal affairs." Their desire was, as above stated, to put back into the constitution what had been construed out of it in *Thomason v. Ashworth*, 73 Cal. 73, and *People v. Henshaw*, 76 Cal. 436. The change was made for the behoof of the citizens of San Francisco and other specially chartered cities and towns in order to exempt them from interference in their local affairs by the enactment of laws binding upon them, but not binding upon the people of the state at large. They had no intention and no wish in extending this reasonable guaranty of self-government to the citizens of specially chartered cities and towns, to go to the extreme length of exempting them from the authority of the legislature in matters of general state policy susceptible of regulation by laws operating uniformly throughout the state upon all persons similarly situated, whether the inhabitants of incorporated cities or not. If this view be correct it indicates the correct construction of the words "municipal affairs." They stand in contradistinction to "state affairs," and whenever a matter is found susceptible of general regulation by a law which binds all the people of the state, and when it is so regulated, it ceases from that time to be, although before it may have been, a municipal affair.

It is thought to be a conclusive argument against this view that it involves the possible extinguishment of all municipal privileges; for it is said if the legislature by exempting what was formerly a subject of taxation by a general law can invalidate local ordinances imposing taxes on the subject so exempted, they could invalidate all local regulations touching matters universally conceded to be of peculiar municipal concern. The validity of this argument depends upon the assumption either that the legislature *can* regulate all such matters by general laws uniformly operating throughout the state, or that, while that is impossible, they will pass laws which in terms purport to make such general regulations, although they are in fact impracticable or oppressive. The

argument that because power may be abused therefore it cannot exist is one that has been repudiated by this and all other courts times without number, and it is not to be supposed that because the legislature may enact oppressive and unreasonable general laws it has no power so to legislate. It unquestionably has the power, and the only remedy for its abuse is the ballot-box. Ordinarily, this is a fairly effective remedy, and at all events it is no help to the construction of a doubtful clause of the constitution to say that if it is construed in a particular way the legislature may do something absurd and unheard of. The alternative assumption that all matters now regarded as peculiarly the subject of local regulation under the powers conferred by special charters may in course of time be found susceptible of reasonable and proper regulation by general laws operative on the same subject throughout the state is opposed to all experience and all probability; but conceding that it might be so, the only result would be, that as such legislation was discovered to be possible with respect to one matter after another now deemed a municipal affair, we should simply find ourselves governed throughout the state by good general regulations, instead of good special regulations in particular localities. Such a prospect should have no terrors for any one imbued with the spirit of a constitution which above all other things insists upon general laws wherever they can be made applicable, and requires all laws of a general nature to have a uniform operation. It is this pervading spirit of the constitution which demands that acts of the legislature establishing and defining the general policy of the state with respect to such a matter as subjects of taxation, should be supreme over all local regulations, and that such a subject so regulated should pass from the category of "municipal affairs."

But whatever may be thought of these views it is at least certain that there must be some criterion other than the mere fact of its inclusion in a charter by which to determine whether a particular provision is a municipal affair. If the mere fact that a provision is in a charter (necessarily for municipal purposes) stamps it as a municipal affair, there is nothing left for that clause of the constitution to operate upon which plainly declares that except in municipal affairs the provisions of all charters are controlled by general laws.

It is said in the principal opinion that a contention of counsel similar to that which I have endeavored to enforce would deprive the amendment of 1896 of any meaning or effect whatever. It seems to me to be giving the amendment a very potent and beneficial effect to hold that it prevents the legislature from impairing the provisions of special charters by laws like the Vrooman Act, which apply only to municipal corporations, and which are in substance mere amendments to the Municipal Corporation Act. This was the effect which Justice McKinstry strove to give to the original section, and this is the effect which the court refused to give it. To reverse that ruling, and restore the constitution to what it was intended to be, is something achieved, so that to give the amendment some effect it is not necessary to go to the extreme of holding that it has rendered local charters supreme over laws that are general in the broadest sense of the word. The legislature has, in effect, declared that no man in the state, in city or county, shall be taxed upon his occupation. If this is a just principle of taxation,—and of that the legislature is the final judge,—it holds good in cities as in counties, each of which requires local revenues for local purposes, and since the law is equally applicable to all the people, and was designed for all, it should bind all alike.

Lorigan, J., concurred in the dissenting opinion.

Rehearing denied.

[S. F. No. 3777. In Bank.—November 30, 1903.]

HERVEY LINDLEY, and POKEGAMA SUGAR PINE
LUMBER COMPANY, Petitioners, v. SUPERIOR
COURT OF SISKIYOU COUNTY, Respondents.

PROHIBITION—TRIAL OF CAUSE—JURISDICTION—REMEDY BY APPEAL—

This court will not sustain a writ of prohibition to prevent the superior court from trying a case before it, for alleged want of jurisdiction, there being a remedy by appeal. It is not a sufficient ground for the writ that the trial will be expensive and troublesome.

PETITION for Writ of Prohibition to the Superior Court of Siskiyou County. J. S. Beard, Judge.

The facts are stated in the opinion of the court.

E. S. Pillsbury, J. F. Farraher, and Pillsbury, Madison & Sutro, for Petitioners.

The petitioners were entitled to have the action dismissed and prohibition will lie to prevent a trial of it. (*Keystone Driller Co. v. Superior Court*, 138 Cal. 738; *White v. Superior Court*, 126 Cal. 245; *Modoc Land etc. Co. v. Superior Court*, 128 Cal. 255; *Hopkins v. Superior Court*, 136 Cal. 552; *Anderson v. Superior Court*, 122 Cal. 216; *Siebs v. Superior Court*, 114 Cal. 551.)

THE COURT.—The petition in this case is for a writ prohibiting the superior court from proceeding to the trial of an action in which the petitioner is a defendant. If, as contended, the superior court is without jurisdiction, there is of course a remedy by appeal for any adverse judgment affecting petitioner, and it is not sufficient ground for interfering by prohibition that the trial will be expensive and troublesome.

The establishment of a rule allowing a resort to the writ of prohibition on that ground would involve too serious and too frequent interruption to the business of the court.

Writ denied.

[L. A. No. 1117. Department Two.—December 1, 1903.]

N. RICHEY et al., Appellants, v. EAST REDLANDS
WATER COMPANY et al., Respondents.

WATER COMPANY—WATER CERTIFICATES IN OTHER COMPANIES—CONSTRUCTION OF RESOLUTION.—A resolution of a water company providing that upon receipt by it of one water certificate regularly issued on stock of each of two other water companies named, and on payment of twenty dollars, "one share of stock in this corporation" shall be issued, "the water represented by the same to be used upon the land in East Redlands of the person to whom said share is issued, the water represented by said share to be delivered at the highest corner of the land whereon the same is to be used," cannot be otherwise construed than as meaning that each share of the water company's stock represented a proportionate part of all the water of the company, and the words "water represented by the same," must be regarded as referring, not to the shares turned into the company, but to the share of stock issued by it.

ID.—CONFIRMATION OF CONSTRUCTION—LIABILITY, EXPENSE, AND BENEFIT OF STOCKHOLDERS.—Such construction of the resolution is confirmed by the liability of each stockholder assumed by the contract of subscription for his proportion of the debts of the defendant corporation and of the aggregate expenses of the water system, and by his presumptive right to a corresponding share of its profits or dividends; and also by the fact that the extra expense of the shares of one of the other water companies was incurred by all of the stockholders of the defendant company, and cannot be supposed to have been incurred for the exclusive benefit of part of them.

ID.—EQUAL RIGHTS OF STOCKHOLDERS.—In the absence of provision to the contrary in the certificates of stock of a corporation, or in its resolutions, by-laws, or charter, or other writing, the stockholders are to be regarded as equal in right.

ID.—USE OF DISTINCT WATER CERTIFICATES OF DISTINCT LANDS—RESOLUTIONS—CONTRACT RIGHTS.—The habitual use by the defendant water company of the water certificates acquired from one of the other companies on lands below its canal, and those acquired from the other company at greater expense on lands above the canal, and the resolutions of the defendant making such distinct use exclusive, cannot preclude stockholders on lands below the canal, whose supply of water has failed, from asserting their contract rights to a proportionate share of the whole water owned by the defendant.

Id.—ADVERSE USER—ESTOPPEL.—The use of the water delivered to some stockholders cannot be regarded as adverse either to the other stockholders or to the company. Nor could the stockholders, whose lands were below the canal, have any right to complain, so long as they were supplied with the amount of water to which they were entitled; and they are not estopped by acquiescence from assertion of their right to their proportionate share of water, which the company had ceased to supply them.

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order denying a new trial. John L. Campbell, Judge.

The facts are stated in the opinion.

Otis & Gregg, and Charles E. Truesdell, for Appellants.

Stockholders are presumed to have an equality of right where the contrary is not expressly provided for. (1 Morawetz on Corporations, sec. 279; Taylor on Corporations, secs. 31, 32, 448, 458; *Plimpton v. Bigelow*, 93 N. Y. 592; *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211-216; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; *Jermain v. Lake Shore etc. R. R. Co.*, 91 N. Y. 483-492; *Field v. Pierce*, 102 Mass. 253-261; *Fisher v. Essex Bank*, 5 Gray, 373-378.) There was no adverse user. (*Ball v. Kehl*, 95 Cal. 606, 613.)

Frank W. Burnett, *Amicus Curiae*, also for Appellants, cited as to equal rights of stockholders, 1 Morawetz on Corporations, sec. 305, and on the question of estoppel, *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185.

E. R. Annable, for Respondents.

Irrigation rights established by a user of ten years should not be disturbed. (Civ. Code, sec. 552; *Merrill v. Southside Irrigation Co.*, 112 Cal. 426.) There may be preferred stock in a corporation. (*Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.) The equities of the case, and understanding of the parties, should be considered. (1 Morawetz on Corporations, secs. 229, 232; *Charter v. San Francisco Sugar Refining Co.*, 19 Cal. 220; *Shorb v. Beaudry*, 56 Cal. 446; *Cornell v. Corbin*, 64 Cal. 197; *Kohl v. Lilienthal*, 81 Cal. 378; *Behlow v. Fischer*, 102 Cal. 208.)

SMITH, C.—Appeal from a judgment for the defendants and from an order denying the plaintiff's motion for a new trial. The plaintiffs are stockholders of the defendant corporation, which was organized in the year 1886 for the purpose of supplying lands of its stockholders with water. The other defendants are three of the directors and the *zanjeros* of the company. The lands in question are subdivisions of a tract of land near Redlands, in the county of San Bernardino, known as the "Chicago Colony Tract," which, it should be understood, lies on a slope looking to the north—the highest point being the southeast and the lowest the northeast corner. The tract is supplied with water by two irrigating ditches, of which the one runs along the southern or upper boundary of the tract, the other across it, from the southeast to the northwest corner. The latter—which is known as the Bear Valley ditch—divides the tract into two nearly equal portions; the upper (exclusive of streets) containing two hundred and fourteen acres, the lower two hundred and nineteen. The aggregate of four hundred and thirty-three acres corresponds to the number of shares of stock of the company originally issued; which is all the stock outstanding, except ten shares subsequently issued, which need not be further considered. From the organization of the company, the lands lying below the Bear Valley ditch have been commonly supplied from it with water, and the lands above it from the upper ditch. Under this arrangement, until the year 1898, all the lands of the stockholders were sufficiently supplied, but in that year the water in the Bear Valley ditch began to fail and soon altogether ceased. Thereupon the plaintiff, whose lands lie below that ditch, demanded of the defendants to be supplied from the upper ditch. But the defendant directors, constituting a majority of the board, refused and directed the *zanjeros* to deliver the water of the upper ditch exclusively to themselves and other owners of lands above the Bear Valley ditch, whereupon this suit was brought to enjoin the continuance of this discrimination. The claim of the appellants is, that the stockholders of the defendant corporation are equally entitled to share in the water to be distributed as in other dividends of the company. That of the respondents is, that the waters of the upper ditch are appurtenant to the lands lying above the Bear Valley ditch,

and those of the latter ditch to the lands lying below it—the defendant company being, it is claimed, a mere agency of the owners of the lands to distribute to each set of stockholders the water to which they are severally entitled. The facts bearing on these contentions, so far as material, are as follows:—

The tract of land supplied with water by the defendant corporation was originally purchased in the year 1886 by the Chicago Colonization Company, which is described by defendants' witness Malone as "a stock company organized in Chicago." This witness was one of the committee sent out by the company which effected the purchase of the land and of the water-rights in question. These water-rights were purchased from one Brown, and consisted of four hundred and fifty-four "Class A certificates" of the Bear Valley Water Company, each entitling the holder to certain supplies of water. It was indeed understood by the committee, and afterwards explained to the company, that the upper part of the tract could not be irrigated from the Bear Valley ditch; but Brown agreed to effect an exchange of two hundred and thirty-five of the Bear Valley certificates for two hundred and fourteen shares of the stock of the Crafton Water Company, another corporation, whose water could be delivered at the highest point of the land. Brown also agreed to put in the necessary pipes, etc., for the distribution of the water on the land, and to vest the same and the Bear Valley certificates in a corporation to be organized by himself and associates, and on the completion of his contract, turned over to the colonization company.

By the terms of the agreement Brown was to receive for the water-rights purchased thirty dollars per acre, and for the construction of the water system or systems, the same amount;—which, with the purchase price of the land (thirty dollars per acre), made the aggregate cost per acre ninety dollars. Accordingly, this arrangement having been made, the land was subdivided and platted by the committee, and for the purpose of distributing it among the individual colonists the several subdivisions were valued at from sixty dollars to one hundred dollars per acre. This appraisement, according to the testimony of Malone, was made without regard to the water, it being contemplated that all the land should be

equally supplied. As stated in his own language, "Our contract was, we were to receive one inch of water to seven acres of the land for the whole. . . . The supply of water was to be the same on all the land; the tract was to receive one inch to seven acres. The only difference was its coming through the two different sources." And he adds: "Our certificates called for one inch to seven acres." Accordingly, upon the report of the committee to the company in Chicago, the lands were distributed by lot to the colonists. But how this was effected—whether by conveyance from the vendor to the company, or some agent of the company, and conveyances from it or its agent to the parties, or by conveyances from the vendor directly to the latter—does not appear. All that appears as to the writings by which the arrangement was carried out is, that the purchasers received "certificates" calling for "one inch [of water] to seven acres."

The defendant corporation was accordingly organized by Brown and his associates, and the four hundred and fifty-four Bear Valley certificates transferred to it; for which, under a resolution of the board of directors of date November 4, 1886, they became entitled, upon the payment of twenty dollars per certificate, to receive an equivalent number of shares of the new company. Accordingly, from the statement signed by Brown, appearing in the minutes of the company, of date February 9, 1887, it appears that the number of shares specified—with other shares the issue of which is not explained—had previously to that date been issued to them, and from the same writing it further appears that the scheme was that these were to be canceled and in lieu of them one share of stock issued to each of the colonists for each acre of land owned by him. This scheme, it may be gathered from the evidence, was carried into effect and the stock issued accordingly, and it is so assumed by the parties and found by the court.

At this time the exchange of Bear Valley certificates for stock of the Crafton Water Company had not been effected, but it seems that Brown and his associates—who continued in the management of the company until some time subsequent to January 11, 1888—had an arrangement with the Crafton Water Company for securing this stock, and that the exchange

was consummated in April, 1890. In the meanwhile, as may be gathered from the resolution of the board of directors referred to in the findings of date September 20, 1892, and other circumstances, the two hundred and thirty-five Bear Valley certificates set apart to be exchanged for the Crafton Water Company stock had been allotted to those of the stockholders owning land above the Bear Valley ditch, and pending the consummation of the exchange under a temporary arrangement between the Crafton Water Company and the Bear Valley Water Company, they were supplied with water by the latter company.

Upon the above facts, it is found by the court, in effect, that it was expressly agreed between the Chicago company and the several colonists that the two hundred and fourteen shares of the Crafton Water Company and the two hundred and nineteen Bear Valley certificates were to be vested in the defendant corporation, the former for the separate use of the colonists owning lands above the Bear Valley ditch; the latter, for the use of those owning lands below it; and that there should be issued to the stockholders of the former class two hundred and fourteen shares of stock, and to those of the latter two hundred nineteen shares, whereby the former should be entitled exclusively to the Crafton, the latter to the Bear Valley water. But these findings are without evidence to support them, and are in fact contradicted not only by the testimony of Malone above cited—on which they are founded—and by the terms of the water certificates referred to by him as issued to the colonists, but by the written contract between each stockholder and the corporation, as expressed in the resolution of the board of directors duly authorized by the by-laws of the company under which the stock was issued, which as embodying the terms of the contract is here inserted: "Resolved, that the stock of this corporation shall be issued only in the manner and on the basis following, to wit: Upon the receipt by the corporation of one water certificate (regularly issued) on stock of the Bear Valley Land and Water Company, or one share of stock of the Crafton Water Company, together with twenty dollars in lawful money of the United States, the president and secretary of this company are authorized to issue to the person transferring such B. V. L. & W. Co. water certificate or share of stock in the Crafton Water

Company, and paying said sum of twenty dollars, one share of stock in this corporation, *the water represented by the same* to be used upon the land in East Redlands of the person to whom said share is issued, the water represented by said share to be delivered at the highest corner of the land whereon the same is to be used."

The language of this resolution cannot be otherwise construed than as meaning that each share of the company's stock represented a proportionate part of all the water of the company, and entitled the holder thereto; and this construction is confirmed by the consideration that by the contract of subscription each stockholder became liable for his proportion of the debts of defendant corporation and of the aggregate expenses of the water system (Civ. Code, secs. 322, 331), and, therefore, presumably entitled to a corresponding share of the profits or dividends of the company. (Civ. Code, sec. 3521.)

It is hardly necessary, therefore, to consider the construction placed on the resolution by the respondents' counsel, which is, that in the expression "*the water represented by the same*" the last word is to be regarded as referring not to the share of the stock issued, but to "*the share turned in,*" or to remark that this is obviously *irreconcilable* with the grammatical construction of the sentence. But it may be observed, as tending strongly to confirm the construction we have placed on the contract, that the two hundred and fourteen shares of the Crafton Water Company's stock were not (as is assumed) turned in by the stockholders whose lands were to be benefited, but, in pursuance of Brown's contract with the colonization company, by Brown and his associates, to whom the corresponding stock was originally issued. These shares were canceled and shares in lieu of them issued to the colonists on the basis of one share to each acre; which was, in effect, a transfer of the stock. The new stockholders, therefore, did not receive their stock in exchange for Crafton water "turned in" by them, but in exchange for more than their share of the Crafton stock jointly owned by the company and turned in by it through Brown. For it is also to be observed that the two hundred and fourteen shares of Crafton water stock were acquired by the company at an extra expense of something over six hundred dollars as compared with the cost of the Bear Valley water—being the value of

twenty-one Bear Valley certificates required in addition to the two hundred and fourteen corresponding to the number of shares acquired, and there is no reason to suppose that the expense thus incurred by all was for the exclusive benefit of part of the stockholders only. There is therefore nothing to exempt the case from the operation of the ordinary rule, which is, that in the absence of provision to the contrary in the certificates of stock, or in the resolutions, by-laws, or charter authorizing its issue, or other writing, the stockholders are to be regarded as being equal in right (Morawetz on Corporations, secs. 279, 305; 2 Thompson on Corporations, secs. 2224, 2250); which indeed is but an obvious application of familiar principles of contract to the relations of the parties. (Civ. Code, secs. 1625, 1638, 1639; Code Civ. Proc., secs. 1856, 1971.)

Much stress is also laid by the respondents' counsel on matters *in pais* occurring since the organization of the company. These are: 1. The habitual use of the Bear Valley water on the land lying below the Bear Valley ditch and of the Crafton water on the lands lying above it; 2. A resolution of the board of directors, of date May 1, 1895, denying the petition of one White "to place a hydrant on the corner of his property lying above the Bear Valley canal," and another resolution of the board, of date July 16, 1896, "that no more water from above the Bear Valley canal be delivered on land below said canal"; and 3. The fact that these resolutions were passed, and that the water was used by the stockholders, or some of them, under claim of right. But we do not think these facts, or the facts found by the court,—which go somewhat beyond them,—can be regarded as materially affecting the rights of the stockholders as determined by their contract with the company. For, from the nature of the case, there could not be any continuing occupancy of the water by any of the stockholders, but occupancy only at times when the water was delivered to them. Nor in view of the relation of the parties could such occupancy as they had be regarded as adverse either to the company or to their fellow-stockholders. Hence no rights could be acquired by

prescription. Nor can any just claim of right, by way of estoppel, be predicated on the plaintiffs' acquiescence in the use of the water as it was used. So long as they were supplied with water they had no right to complain, and there is therefore no ground on which they can be held to be precluded from asserting their right to their proportionate share of the water, now that the company has ceased to supply them.

We advise that the judgment and order appealed from be reversed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

McFarland, J., Henshaw, J., Lorigan, J.

[Crim. No. 982. In Bank.—December 3, 1903.]

THE PEOPLE, Respondent, v. CHARLES WARDRIP, Appellant.

CRIMINAL LAW—TRIAL FOR MURDER—REFUSAL OF INSTRUCTIONS SUBSTANTIALLY GIVEN—DISCRETION OF JURY—CONFESSION AND ADMISSIONS.—Upon the trial of a defendant charged with murder, the defendant is not prejudiced by the refusal of instructions substantially given in the charge of the court relative to the discretion of the jury in determining the penalty in case of conviction, and relative to the admissibility of an alleged confession and to considering the whole of alleged statements and admissions of the defendant.

ID.—CONNECTION OF MURDER WITH BURGLARY—INAPPLICABLE INSTRUCTION.—Where the evidence showed that if appellant killed the deceased, the killing was in immediate connection with a burglary and before flight, a requested instruction relative to a murder committed after an attempt to perpetrate a burglary, and when the party is in flight, as not being within the meaning of section 189 of the Penal Code, was properly refused as inapplicable to the evidence.

1D.—CONSIDERING ADMISSIONS WITH CAUTION—INSTRUCTION AS TO
MATTER OF FACT—HARMLESS REFUSAL—COMMONPLACE MATTER.—

A requested instruction relative to the jury receiving with caution all evidence of the oral admissions of the defendant, seems, under the weight of authority, in violation of the constitutional provision against charging as to matters of fact; but without finally so deciding, the refusal of the instruction cannot be deemed ground for reversal, as it states mere commonplace matter within the general knowledge of jurors.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial.
E. C. Hart, Judge.

The facts are stated in the opinion of the court.

L. T. Hatfield, and C. T. Jones, for Appellant.

U. S. Webb, Attorney-General, and C. N. Post, Assistant Attorney-General, for Respondent.

McFARLAND, J.—The defendant was charged with the murder of one Hugh Duffy. He first pleaded "Guilty," but afterwards withdrew that plea and pleaded "Not guilty." He was convicted of murder in the first degree, and judgment of death followed. He appeals from the judgment and from an order denying the motion for a new trial.

The main contentions of appellant for a reversal are based on the refusal of the court to give certain instructions asked by appellant, and those discussed in the briefs are numbers 18, 19, 22, 25, and 26.

Number 26 is merely a statement to the jury that if they should find the appellant guilty of murder in the first degree they have the discretion of determining whether the punishment should be death or imprisonment for life; but in another part of the instruction the jury were expressly so instructed, and were clearly told what the form of their verdict should be in order to express their discretion touching the penalty of death or imprisonment. They were fully informed on the subject.

Number 25, which is in substance to the effect that a murder committed after the perpetration of or attempt to perpetrate

a burglary, and when the party is in flight, is not done in such perpetration or attempt to perpetrate within the meaning of section 189 of the Penal Code. This proposed instruction was not applicable to the evidence in the case, which shows that, if appellant killed Duffy, the killing was in immediate connection with the burglary, and before flight.

Number 22 was merely that a confession to be admissible must be freely and voluntarily made, etc.; but the court had given the instruction, substantially, in other parts of the charge; among other things it had said: "In considering the weight to be given to any alleged confession made by defendant, you should consider all the testimony in the case upon that point, the position of the defendant at the time, his surroundings, his strength of mind as shown by the evidence, and any hopes or fears, if any, that may have influenced him."

Number 18, to the effect that "when there was evidence of admissions made by defendant, he is entitled to have the whole of the statement or admission heard and considered by the jury," was covered by other parts of the instruction, and defendant was not prejudiced by the refusal to give it. On this subject the jury was told that "In considering the evidence as to the oral admissions of the defendant touching the matters involving the offense with which he is charged, you will take into consideration all the statements made by him, whether for or against himself, and give such statements fair consideration."

The only point in the case which calls for any extended notice is based upon the refusal of the court to give the requested instruction number 19, which is as follows: "The jury is instructed that, in considering the testimony in this case, they will receive with caution all evidence of the oral admissions of the defendant against himself." It is provided in section 2061 of the Code of Civil Procedure that the jury is to be so instructed, "on all proper occasions." But in *Kauffman v. Maier*, 94 Cal. 269, it was held by the court in Bank, after an elaborate discussion of the question, that such an instruction was in violation of the provision of the state constitution that "judges shall not charge juries with respect to matters of fact." In *People v. O'Brien*, 96 Cal. 180, *Kauffman v. Maier* was approved, although it was said that

possibly such instruction might be given as to the witnesses for the people—reference being made to section 1111 of the Penal Code, which, however, merely announces the rule that a defendant cannot be convicted on the uncorroborated testimony of an accomplice. In the later case of *People v. Sanders*, 114 Cal. 216, decided in Department, where the judgment was reversed for other reasons, it is merely said, in the course of an elaborate opinion, that an instruction similar to the one here in question was unobjectionable and should have been given; but no reference is made to *Kauffman v. Maier*, 94 Cal. 269, and the attention of the court was evidently not called to the question of the constitutionality of the part of section 2061, which directs the giving of such instruction. We think that, as the former decisions of the court stand, the weight of authority is to the point that the instruction here in question is in violation of the constitutional injunction against judges charging as to matters of fact; but, in our view of the matter, it is not necessary for us here to finally determine that question. The proposed instruction states a mere commonplace within the general knowledge of jurors; and we do not think that either the giving or the refusing of such an instruction would warrant a reversal. As was said in *Kauffman v. Maier*, "It is a matter of common knowledge that the statements of a witness to the verbal admission of another are liable to be erroneous, and for that reason should be received with caution." In *People v. Newcomer*, 118 Cal. 263, a reversal was sought because an instruction somewhat similar to the one here under review had been given, but the court said that instruction "could not possibly have done any harm, for it was merely telling the jury to do certain things which jurors would do without being so told. Therefore, it was not reversible error." For the same reason, the refusal to give the instruction here in question is not ground for a reversal.

There are no other points in the case which call for special notice. We think that the appellant had a fair legal trial.

The judgment and order appealed from are affirmed.

Angellotti, J., Shaw, J., Van Dyke, J., Beatty, C. J., and Lorigan, J., concurred.

THE COURT.—Rehearing denied.

In denying a rehearing in this case, it is proper to add that upon the question as to the constitutionality of our statute providing that the jury are, on all proper occasions, to be instructed that the testimony of an accomplice ought to be viewed with distrust and the evidence of the oral admission of a party with caution (Code Civ. Proc., sec. 2061), which question was fully argued both in the briefs herein and orally, we are of the opinion that, so far as the statute requires such an instruction ever to be given, it is unconstitutional, for the reason that such an instruction would be in violation of the constitutional injunction against judges charging as to matters of fact. It has been frequently said by this court that the giving of such an instruction will not be held reversible error where by it the jury are instructed as to mere commonplace matters within their general knowledge (*People v. Wong Bin*, 139 Cal. 60, 65; *People v. Farrington*, 140 Cal. 656), but we are satisfied that a judgment should never be reversed for the refusal on the part of the court to instruct upon matters of fact.

[Crim. No. 981. In Bank.—December 8, 1903.]

THE PEOPLE, Respondent, v. **WILLIAM H. GLOVER**,
Appellant.

CRIMINAL LAW—MURDER—SELF-DEFENSE—INSTRUCTIONS—“CLAIMS” OF DEFENDANT.—Upon the trial of a defendant charged with murder, who admitted the killing, and relied upon the excuse of self-defense, and requested instructions thereupon, it was proper for the court to preface the instructions given with the statement that they were “based upon this claim of the defendant that he acted in self-defense”; and such use of the word “claim” is not prejudicial, or open to criticism.

ID.—APPARENT DANGER—SUFFICIENT CAUSE FOR BELIEF—INSTRUCTION PROPERLY MODIFIED.—A requested instruction that “a person may repel force by force in the defense of person, property, or life, against one who manifestly intends or endeavors by violence or

surprise to commit a known misdemeanor or felony, or either, or to do great bodily injury to his person, and the danger which would justify the defendant in the act charged against him may be either real or apparent; and the jury are not to consider whether the defendant was in actual peril of his life or property, but only whether the indications were such as to induce a reasonable man to believe that he was in such peril of person or property; and if he so believed reasonably [and had sufficient cause so to believe], and committed the act complained of under such belief, even though it should appear that the deceased was not armed, you should acquit the defendant,"—was properly modified by inserting the words "and had sufficient cause so to believe," and as so modified the instruction clearly expresses the law.

ID.—PROPER INSTRUCTIONS.—Instructions upon the law of self-defense, consisting of a concise statement of the language of subdivision 3 of section 197 of the Penal Code, and of excerpts from the language of the court in *People v. Hecker*, 109 Cal. 462, were properly given.

ID.—SEEKING QUARREL WITH DESIGN TO CREATE NECESSITY—APPLICABILITY OF INSTRUCTION—PROVINCE OF JURY.—An instruction that the plea of self-defense is not available where a person seeks a quarrel with the design of creating a real or apparent necessity for killing, correctly states the law, and is not erroneous, whether it is applicable or inapplicable to the evidence. Where there was evidence to which it might apply, the instruction was properly given, and it was the exclusive province of the jury to determine whether the quarrel was sought by the defendant with such design.

ID.—FAULT OF DEFENDANT—INSTRUCTIONS CONSTRUED TOGETHER.—An instruction that "a defendant who justifies under a claim of self-defense must himself have been without default," and predicating the absence of fault, as a condition of being justified in acting under a belief of imminent danger, must be construed in connection with all of the instructions of which it forms a part, concerning the conditions on which the right of self-defense may be asserted,—that he was not the first aggressor, or, if so, that he had endeavored to decline further struggle and that he had not sought the quarrel with the design of forcing a deadly issue, or inviting a real or apparent necessity for killing,—and so construed, the instruction is limited, pertinent, and applicable.

ID.—MALICE AFORETHOUGHT—INFERENCE FROM CIRCUMSTANCES.—An instruction that, "whether the defendant does or does not act with malice aforethought, is always to be inferred from the circumstances surrounding the case," is not subject to just criticism by the defendant, whether it be considered as standing alone or as construed with other instructions fully dealing with the subject of malice aforethought.

ID.—IRRELEVANT TESTIMONY—HARMLESS RULING.—The admission of irrelevant testimony having no bearing on the case on re-examina-

tion of a witness for the prosecution, where the same matter had been originally brought out on cross-examination of the witness by defendant's counsel, is harmless.

ID.—CROSS-EXAMINATION—RE-EXAMINATION—EXPLANATION OF CONTRADICTIONARY STATEMENT—FALSITY.—Where a witness for the prosecution is sought to be impeached on cross-examination by a contradictory statement made immediately after the homicide, which the witness admitted to have made, the witness is entitled on re-examination to explain that such contradictory statement was not true.

ID.—SILENCE OF WITNESS—EXPLANATION OF MOTIVE.—Where the defendant, on cross-examination of a witness for the prosecution, who was a daughter of the deceased, showed that she did not say anything to her father or a doctor who was with him as to the presence of the defendant, she was properly permitted on re-examination to explain her motive for not informing them of the declared intention of defendant to kill her father, that the defendant was watching her with a gun in hand, and that she was afraid that he would kill both herself and her father.

ID.—DYING DECLARATION—RES GESTAE.—Where the preliminary proof clearly showed that the dying declaration of the deceased was made in the full belief of impending death, it is not objectionable as stating a fact which was part of the *res gestae*, that when defendant approached the house the deceased was talking with the defendant's brother about a horse-collar.

ID.—WEIGHT OF DEFENDANT'S BROTHER.—It was not prejudicial error to permit the prosecution to ask the defendant's brother, when a witness, as to his weight, where it was obvious to the jury that he was a large man and able physically to have intervened and stopped the killing of deceased, and where he had testified in effect that he did not intervene because he did not think there was going to be any trouble till it was all over.

ID.—STATEMENT OF DAUGHTER OF DECEASED—HEARSAY—FOUNDATION NOT LAID.—It was not error to refuse to permit a witness for the defendant to testify to a statement made by the daughter who was a witness for the prosecution. If it was the same as she made while on the stand, it was inadmissible hearsay; and if different it could not be shown to impeach her testimony, where no foundation was laid on cross-examination for its admission; and where the court offered to allow the defense to recall the witness to lay a foundation, and the offer was rejected, the defense must abide by such rejection.

ID.—IMPOSITION OF DEATH PENALTY—PROVINCE OF JURY.—Where the evidence on the part of the prosecution was such that if believed by the jury they were warranted in finding the defendant guilty of murder in the first degree, it was in the province of the jury to impose the death penalty, and this court cannot interfere with the exercise of their judgment.

APPEAL from a judgment of the Superior Court of Placer County and from an order denying a new trial. J. E. Prewett, Judge.

The facts are stated in the opinion of the court.

F. P. Tuttle, and Charles Tuttle, for Appellant.

U. S. Webb, Attorney-General, and J. C. Daly, Deputy Attorney-General, for Respondent.

LORIGAN, J.—The defendant was convicted of murder in the first degree and sentenced to death, and from the judgment and order denying his motion for a new trial appeals.

The homicide consisted in the killing of one Frederick Nierhoff, at his home in Placer County, on the afternoon of June 11, 1902. The defendant was engaged with the consent of her father, the deceased, to be married to his daughter,—Agnes Nierhoff,—a young girl fourteen years of age, and the claim of the prosecution was, that the killing upon the part of defendant was prompted by revenge for having been ordered off his premises, the day before, by the deceased.

On behalf of the defendant it was insisted that the killing was done in necessary self-defense.

In the briefs no point is made as to the sufficiency of the evidence to sustain the verdict, but it is insisted that the court erred in modifying certain instructions asked by the defendant; that it misdirected the jury in certain other instructions given of its own motion, and complaint is made, also, of rulings of the court in the admission and rejection of evidence.

Upon the instructions:—

1. The defendant proffered many instructions on the plea of self-defense, premised generally with the statement that, "the defendant in this case admits the killing and excuses himself on the ground of self-defense."

The court, after reading this preliminary statement to the jury, and immediately before giving the instructions tendered, said: "I am now about to give you a number of instructions based upon this claim of the defendant that he acted in self-defense."

It is insisted that the use of the word "claim" was prejudicial to the defendant.

There is no substantial merit in this point. Nor is the use of the word even open to criticism. Used either colloquially or definitely, it means the assertion of a right, and in the context, where found, it refers to the assertion by the defendant that the killing was excusable because committed by him in the exercise of the right of self-defense. Whether in instructing a jury upon this asserted right invoked by a defendant, the court uses the terms, "it is insisted," "it is contended," or "it is claimed" on the part of defendant, that the killing was in necessary self-defense, the terms have the same legal equivalent, and mean that, while conceding the killing, yet the defendant asserts that he had a right to slay the deceased in necessary self-defense.

In the case of *People v. Iams*, 57 Cal. 118, it will be observed, in that part of the instructions which was given on this plea of self-defense, the lower court used the term "claim" as it was employed in the instruction complained of in the case at bar.

That portion of the instruction in the *Iams* case, in which this word "claim" is found has, at least since that case was decided, been almost universally given in its entirety, as an instruction in homicide cases, where the plea of self-defense has been interposed, and notwithstanding the successive appeals to this court in such cases, our attention is not called to any case in this court in which the correctness of its use has even been questioned.

In the limited criticism which counsel devotes to the instruction, he neither advances good reasons against the use of the term employed, nor suggests, or indicates, any language which in his judgment, would be more appropriate, or less objectionable, nor has he referred us to any authority, in the wide range of criminal law, where a similar instruction has either been censured or disapproved.

2. The next ground of complaint arises from the modification by the court of two instructions requested by the defendant, on the law of self-defense. Only one of these need be referred to at length, in order to illustrate the point common to both. The court instructed the jury: "A person may

repel force by force in defense of person, property, or life, against one who manifestly intends or endeavors, by violence or surprise, to commit a known misdemeanor or felony, or either, or to do great bodily injury to his person, and the danger which would justify the defendant in the act charged against him may be either real or apparent, and the jury are not to consider whether the defendant was in actual peril of his life or property, but only whether the indications were such as to induce a reasonable man to believe that he was in such peril of person or property. And if he so believed reasonably [and had sufficient cause so to believe], and committed the act complained of under such belief, even though it should appear that the deceased was not armed, you should acquit the defendant." The modification complained of in this, and the other instruction referred to, consisted in inserting therein the words, "and had sufficient cause so to believe," and giving them as so modified. The modification was proper, and the instructions as modified clearly express the law. Counsel claim that the instructions as modified lacked precision and clearness, and were confusing, but do not point out in what particular they are open to these objections, and we are unable to discover them.

The instructions as given informed the jury, that it was not enough that there should exist in the mind of the defendant a belief that he was in actual peril, but that the indications and circumstances as they presented themselves when he acted upon them, must have been such as to have furnished sufficient cause for such belief, and that the test to be applied by the jury, in determining whether these indications of peril were such as to furnish sufficient cause for the belief, was not whether defendant so believed therefrom, but whether a reasonable man, placed in the situation of the defendant, would have been justified from such appearances in so believing.

The court doubtless considered, and there was ample room for it, that the language in the proffered instruction, "and if he so believed reasonably," was susceptible of being construed by the jury to mean, that the actual belief of the defendant from the appearances of peril, as he viewed them, should exclusively govern their determination of whether he acted in self-defense or not, and for the purpose of obviating

any misconception upon that point, inserting the words, "and had sufficient cause so to believe." It was the duty of the court to so formulate the instruction as to obviate any danger of the law being misunderstood, and as clearly as possible inform the jury that, in order to justify the defendant under his plea of self-defense, it must appear not only that defendant actually believed himself in deadly peril, but that as a reasonable man he had sufficient grounds for his belief, and as so modified the court correctly declared the law.

A person may have a lively apprehension that he is in imminent danger, and believe that his apprehension is based on sufficient cause and supported by reasonable grounds; that such apprehension is reasonable and warranted from appearances as they present themselves to him. If, however, he acts on these appearances, he does so at his peril, because the law leaves it to no man to be the exclusive judge of the reasonableness of the appearances upon which he acts, but prescribes a standard of its own, which is, not only did the person acting on the appearances himself believe that he was in deadly peril, but would a reasonable man, situated as the defendant was, seeing what he saw, and knowing what he knew, be justified in believing himself in danger.

Recognizing the error into which the jury might fall, and with the correct rule of law in view, the court properly modified the instruction.

It is insisted that the court erred in giving instructions numbers 24, 25, and 26. It is not insisted that they declare incorrect principles of law, but it is claimed that the first two are too broad, and that there was no evidence in the case to justify the last.

Instruction number 24 is a concise statement of the language of the Penal Code (sec. 197, subd. 3), and specifies the conditions under which the right of self-defense can be invoked. It is invariably given where the right of self-defense is asserted. Instruction number 25 is an excerpt from the language of the court in *People v. Hecker*, 109 Cal. 462, and is also applicable under the plea of self-defense.

Instruction number 26 is also an excerpt from the same case, and under it the jury were informed that the plea of self-defense is not available where a person seeks a quarrel,

with the design of creating a real, or apparent, necessity for killing. This last instruction, defendant insists, should not have been given, because he claims there was no evidence in the case upon which to predicate it. Even so, this of itself would not constitute error. As a general proposition of law, the doctrine announced in the instruction is correct. The most that can be said against it is, that it embraces an abstract principle, not specially relevant to the facts in the case at bar, but given with other full and clear instructions upon the same branch, and which were applicable. If, in fact, there was no evidence to which it applied, it could not be considered by the jury. There was evidence, however, to which the pertinent instructions given on the same subject, and in the same general line, could be applied, and it must be assumed that the jury employed their deliberations in considering the evidence under those principles which were applicable, rather than that they frittered away their time in considering abstract principles to which it was inapplicable.

Nor are we prepared to say that there was no evidence to which the instruction could be addressed. There was evidence in the case tending to show that defendant had secreted himself in the house of deceased, with the expressed intention (undisclosed to the deceased) of killing him; that while deceased, and the brother of defendant, were conversing at the barn near the house, the defendant left the house, taking with him a rifle belonging to the deceased, which he had found therein; that he proceeded towards the deceased with the weapon held in position for action; that while no word was spoken by him as he approached, yet his appearance and actions were sufficient to call forth an exclamation from defendant's brother and the deceased, directed to him, "not to shoot"; that while he was approaching, according to his own story, and without his having uttered a word to deceased, or made any hostile demonstration, or intending to do so, the deceased rushed towards him, picking up a club on his way, and endeavored to take the rifle from him, and tried to strike him with the club, when, in self-defense, he fired the fatal shot.

In the face of the evidence, it was the exclusive province of the jury to say, whether defendant's approach towards the deceased was with the innocent intention which he avowed,

or whether it was with a preconceived intention to kill him, but made under such circumstances as to invite an appearance of hostile attack, which defendant would subsequently disclaim, but upon which the deceased would presumably act, and endeavor to repel, with such weapon as chance might provide, yet, with the certainty on defendant's part that the deceased could, in the emergency, provide himself with no means which could meet his superior and effective weapon, deliberately provided for the purpose, or frustrate or foil his purpose to kill.

Whenever an assault is brought upon a person by his own procurement, or under an appearance of hostility which he himself creates, with a view of having his adversary act upon it, and he so acts and is killed, the plea of self-defense under such circumstances is unavailing.

Waiving all other considerations concerning this challenged instruction, it was, we think, properly given to the jury under the evidence referred to.

4. The legal accuracy of instruction number 28 is questioned. It reads: "A defendant who justifies under a claim of self-defense must himself have been without default before he can claim the full protection of the law. In such case, if you find from the evidence that the defendant was without fault, and while so without fault, was placed by the deceased under circumstances sufficient to excite the fears of a reasonable man that the deceased designed to commit a felony or some great bodily injury upon him, and as to afford grounds for a reasonable belief that there was imminent danger of the accomplishment of such design, he was justified in acting under such fears."

Particular exception is taken to the use of the language, "must himself have been without default before he can claim the full protection of the law." This, in counsel's estimation, is also entirely too broad a statement of the principle it contains. No question is made, or can be made, of its legal accuracy. (*People v. Westlake*, 62 Cal. 307.) It is only the amplitude of this statement that is complained of. Counsel suggests that the jury, under it, might feel warranted in taking into consideration other acts of the defendant, aside

from the circumstances of the killing itself. The broadness of language which counsel complains of arises only when the particular sentence adverted to is cut out from the context and examined alone. This, however, is not the approved or proper way to examine instructions, or parts of instructions. It will not do to take isolated or excised sentences, or phrases, and so put them to the crucial test. Instructions, for the purpose of determining whether they correctly state the law or not, are to be considered in their entirety, and the language used in each is to be considered, not only with reference to the special instruction of which it is a part, but in connection with all the instructions, precedent and subsequent to it, and particularly with reference to all instructions bearing on the same main legal proposition of which it forms a part. Examining the instruction complained of, under this rule, we find it immediately preceded by instructions concerning the conditions under which the right of self-defense may be asserted—that he was not the first aggressor, or, if so, that he had endeavored to decline further struggle; that he had not sought the quarrel with the design of forcing a deadly issue, or creating or inviting a real or apparent necessity for killing, which, if present to one without blame, would justify the homicide;—these were the conditions to which the language complained of had reference, and to which the terms “default,” and “fault,” as also used in the instruction, applied. This is obvious, too, when the terms are considered in relation to the context of the special instructions where they are found; they there apply to the circumstances and situation of the deceased and defendant at the time the killing occurred, and under which he asserts that he was justified in taking the life of deceased. Considered with reference to the preceding and subsequent instructions to which it applies, and also with relation to the particular instruction of which it is a part, it is limited, pertinent, and applicable. So, even if the language of the instruction were open to the criticism that it states the principle too broadly, it appears so only when examined aside from the context in which it is found.

5. Appellant insists that the court erred in instructing the jury that, “whether the defendant does, or does not, act with malice aforethought is always to be inferred from the circumstances surrounding the case.”

As was said of the previous instruction, this sentence is part of an instruction which, together with various other instructions given by the court, fully deals with the matter of malice aforethought—the great criterion distinguishing murder from other killing.

Standing alone, however, we perceive no ground for criticism. Malice may always be inferred from the circumstances in the case—the evidence presented and considered by the jury. If there are other additional legal rules for determining it the defendant cannot complain because the jury were restricted to one of such rules. The restriction in this regard was favorable to him, and he has no reason to complain of it.

Exception is taken to the language of some of the other instructions in the case, but, as they are not supported in the briefs by either argument or authority,—simply referred to,—we have not called particular attention to them. In view, however, of the gravity of the case, we have examined them and find them correct.

The court, upon its own motion, fully and fairly instructed the jury upon all matters necessary for their consideration, and gave every instruction requested by the defendant—which constituted half of the instructions given—as presented, with the single modification in the two instances complained of. As far as the instructions given in the case are concerned, taken as a whole, they are correct and fair, and defendant has no ground of complaint on their account.

Certain errors of law are insisted on, and we will now consider them.

6. Agnes Nierhoff, daughter of deceased, the girl to whom defendant was engaged, was a witness for the prosecution. She and defendant had been driving on the Sunday prior to the homicide. On redirect examination by the prosecution, over defendant's objection, she testified that, while out driving, at defendant's suggestion that he wished to get his mother's picture and a horse-collar, they drove to the ranch of Oscar Glover, the brother of defendant. This ruling, if error, was harmless. The testimony had no bearing whatever on the case, and there is no pretense that at this time there was any ill-feeling between defendant and deceased. Aside

from this, the matter had been originally brought out in the cross-examination of the witness by defendant's counsel.

7. This same witness—an eye-witness to the tragedy—upon the trial and on behalf of the prosecution, testified against the defendant; her testimony tended to show that the killing of her father by the defendant was unprovoked, deliberate, and premeditated.

On cross-examination the counsel for defendant confronted her with a statement, made immediately after the homicide, contradictory of her statement against him on the trial, which previous statement, if true, was exculpatory of the defendant. She admitted on cross-examination that she made such statement. On redirect examination, over defendant's objection, the witness was permitted to testify that these prior statements were untrue. Counsel suggests that the prosecution should have been restricted to proving the untruth of the statement by competent and relevant testimony, and not by the sweeping statement of the witness. But the testimony of the witness was both competent and relevant on this point. She best of all knew which of her statements was true. She had given the one and was confronted by the other; they were inconsistent, and she had a right to explain, under section 2052 of the Code of Civil Procedure, her former statements. If, in the explanation, she declared that her former statements were untrue, this certainly was an explanation, as far as it went, and no reasonable objection could be made to this method of explaining it.

Counsel's objection, too, was that it was not cross-examination, irrelevant, and immaterial. It was certainly proper redirect examination because the contradictory statement was brought out by counsel for defendant on cross-examination, and it is material and relevant in all trials to properly show the credibility, or want of credibility, of a witness, and this end is attained in some degree by the declaration of the witness herself that she has made prior false or contradictory statements on the same subject.

8. This same witness was asked on redirect examination why she had not told her father and one Dr. Dozier, who visited him on the premises, and with whom she conversed, of the presence of the defendant in the house, and of his de-

clared intention of killing her father. The witness, over the objection of defendant, answered that during all the time the defendant was watching her with gun in hand, and she was afraid if she said anything to either her father or Dr. Dozier, he would kill both herself and her father. The inquiry was proper. The defendant on cross-examination had brought out the fact that she did not converse with the doctor when he came, or inform her father of the defendant's presence. As the natural inquiry would be, why did she not do so, she had a right to explain her conduct in this regard. The objection of defendant was, that her motive in not telling her father, or the doctor, should not be a question for consideration by the jury. As motive is the mainspring of human action, when it is ascertained the jury can all the more readily determine whether given conduct was inspired by it or not.

We have thus far adverted particularly to such assignments of error as we deem worthy of special mention.

Several others are relied upon, but we do not think they call for any extended consideration. The claim that there was not sufficient proof to warrant the admission of the dying declaration of deceased in evidence is not tenable. The proof is all one way, and conclusive on the point, that it was made by the deceased in the full belief of impending death. Nor can any exception be taken to the statement by the deceased in his dictated dying declaration that, when defendant approached from the house, deceased and defendant's brother Oscar were talking about a horse-collar. The testimony of all parties shows this to have been the fact, and besides, as a fact and circumstance immediately attending the homicide, it was part of the *res gestae*. There was no prejudicial error in permitting the prosecution to ask the witness Oscar Glover his weight. Even conceding, as defendant contends, that it was for the purpose of proving that he was a large man physically, and able to have intervened and stopped the killing of deceased, yet this was all apparent to the jury without inquiry. They saw the witness, and could judge for themselves of his physical proportions. He did not intervene because, he testified in effect, that he did not think there was going to be any trouble until it was all over. It was not error for the court to refuse to allow the witness Charles Glover to

testify as to any statement made by the witness Agnes Nierhoff to him concerning the homicide. If it was the same as she made on the stand, it was inadmissible as hearsay. If contradictory, it was in the nature of impeachment, and her attention should have been first called to it while on the stand, pursuant to section 2050 of the Code of Civil Procedure. In sustaining the objection, the court offered to allow the defense to recall the witness Agnes, and lay the proper foundation for the introduction of the testimony of Charles, but the defense declined to avail itself of the offer. This offer of the court gave the defendant all he was entitled to; having rejected the benefit of it he must abide by the rejection.

This embraces all the objections which are made to the rulings of the court, and, in our judgment, none of them are well taken.

While counsel for defendant in their briefs disclaim any intention of questioning the sufficiency of the evidence to warrant the guilt of the accused, they contend that it is not sufficient to warrant the infliction of the death penalty, and in this regard it is insisted that the jury, actuated by prejudice, rendered a verdict fixing a higher degree of crime than the facts, susceptible of belief, justified. We find no justification in the record for this claim of counsel. There is nothing in the record tending to show that the jury were in any respect actuated by prejudice against the defendant. We cannot invade the province of the jury and substitute our judgment for theirs, as to the sufficiency of their finding on controverted facts. There may, it is true, arise an exceptional case, where the testimony in behalf of the prosecution is so improbable and incredible that the court, convinced of its falsity or absolute insufficiency to warrant a verdict of guilty, would deal with it as a matter of law. This, however, must be an extreme case, and such is far from being suggested by the record before us. There was evidence on the part of the prosecution which, if believed by the jury, warranted them in finding the defendant guilty of murder in the first degree. Their verdict shows them to have believed it, and as the law leaves it to the sound and discriminating judgment of the jury what penalty they shall award for that degree of

crime, we cannot interfere with the exercise of that judgment, even where the penalty is death.

Finding no error in the record, the judgment and order appealed from are affirmed.

McFarland, J., Angellotti, J., Shaw, J., Van Dyke, J., Henshaw, J., and Beatty, C. J., concurred.

[L. A. No. 1105. Department Two.—December 5, 1903.]

LOLA A. PRATT, Respondent, v. CHARLES PRATT et al.,
Appellants.

NEW TRIAL—IRREGULARITY OF COURT—AFFIDAVIT—RECORD UPON APPEAL—PRESUMPTION.—Where the record upon appeal shows no objection to an affidavit on motion for a new trial as to irregularity in the proceedings of the court by which the defendants were prevented from having a fair trial, and shows no objection presented to the affidavit in the court below, it must be presumed upon appeal that the affidavit was received and considered by the court without objection.

ID.—INTERRUPTION OF TESTIMONY—COMPELLING WITHDRAWAL OF WITNESS—THREATENED PREJUDGMENT OF DEFENDANT'S TESTIMONY—ERROR OF LAW—IRREGULARITY.—Where the judge trying the cause interrupted counsel for the defendant, while examining the daughter of plaintiff and defendant as a witness for the defendant, who was giving competent testimony, and did in an irregular way control the conduct of defendant's case, and virtually threatened to prejudice the testimony of the defendant as a witness intending to testify in his own behalf, unless the daughter was withdrawn as a witness against her mother, which threat led to such withdrawal, such action of the court, conceding that it was an error of law, was prejudicial irregularity, preventing a fair trial to the defendant, which was ground for a new trial, and for reversal of an order denying it.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. M. T. Allen, Judge.

The facts are stated in the opinion.

S. A. W. Carver, and A. W. Hutton, for Appellants.

The action and expressions of the court, as shown by the affidavit, were an irregularity entitling appellants to a new trial. (*People v. Williams*, 57 Cal. 110; *McMinn v. Whelan*, 27 Cal. 319; *Mahoney v. San Francisco etc. Ry. Co.*, 110 Cal. 471; *McDuff v. Detroit etc. Co.*, 84 Mich. 1;¹ *Savannah etc. Ry. Co. v. Hardin*, 110 Ga. 433; *Lord v. Lord*, 3 N. Y. Supp. 567.)

Scarborough & Bowen, for Respondent.

The affidavit does not show an irregularity entitling defendants to a new trial. (11 Am. & Eng. Ency. of Law, 843; Hayne on New Trial, secs. 108, 265, 281, 285; Code Civ. Proc., sec. 475; *Coonan v. Loewenthal*, 129 Cal. 197; *Duffy v. Duffy*, 104 Cal. 602; *Edwards v. Wagner*, 121 Cal. 376; *Pereira v. City Savings Bank*, 128 Cal. 45.)

GRAY, C.—The above-named plaintiff and defendant are wife and husband. In the action the plaintiff sought an accounting from her husband in regard to his management and disposition of her separate property derived from the estate of her mother, and which she had confided to the control of her said husband on its coming into her hands. She also sought to have a certain note, mortgage, and deed, affecting a certain piece of her real estate, and executed by herself and her husband to her husband's father, decreed to be given up and canceled, because induced by the fraud and undue influence of her husband. Plaintiff had judgment, and defendants appeal therefrom and from an order denying them a new trial.

The transcript on appeal contains the judgment-roll, a statement on motion for a new trial, embracing the evidence taken and proceedings had upon the trial, and a bill of exceptions, duly settled and signed by the judge after denying the said motion, containing an affidavit used thereon for the purpose of establishing the first ground of said motion, which was "irregularity in the proceedings of the court by which the said defendants were prevented from having a fair trial." This affidavit is uncontradicted, and it sets forth that the

¹ 22 Am. St. Rep. 673.

affiants were present at the trial on the tenth day of April, 1900, and heard and saw all that transpired in court at the time the witness Florence D. Pratt was placed upon the witness-stand; that previously the plaintiff testified on behalf of herself that there had never been any settlement made or accounting had between herself and her husband concerning the properties or funds derived from the estate of her mother; that her husband was still indebted to her in the sum of four to six thousand dollars, as the balance of the funds of her mother's estate still in his hands unaccounted for; that her husband had admitted to her that he had received said funds for her; that after coming to California her husband bought and improved the Miltimore Tract property in her name and as her own property; that her husband had charge of renting said Miltimore Tract property, and collected and retained the rents therefrom, and attended to everything about it; that she never had or obtained any money on said property or otherwise from her own funds or property.

That on said tenth day of April, 1900, the defendant called said Florence D. Pratt to the witness-stand to testify in said cause on behalf of the defendants; that said witness claimed to have personal knowledge of certain conversations heard by her between the plaintiff and defendant Charles Pratt, regarding their property matters, and particularly regarding the Miltimore Tract property and the rents and profits therefrom and the use made of the same; and that the defendants then desired to have said witness testify regarding said matters, and expected to prove by her that during all the years since she was of an age sufficient to understand and remember family affairs she had heard the property affairs and business matters of her mother and father and her grandmother's estate matters talked over between them on many occasions, and had never heard either her father or mother in any way mention the fact of there being any unsettled matter between them concerning the property or funds derived from her grandmother's estate, Anastasia L. Clark; that during said period of time she saw and heard many money transactions between her said parents in which the money accounts between them were purported and stated to be settled, but that in none of said instances

was the matter of any balance of funds in her father's hands belonging to her mother ever mentioned between them; that of her personal knowledge, and from the statements made to her by her mother, she knew that the rents collected from the Miltimore Tract property were regularly turned over to her mother, and were not retained or used by her father; that said witness thereupon took the stand and was properly sworn and attempted to testify regarding said matters, and that the following is the substance of what then and there occurred and of the statements made respectively by the parties, to wit: Florence D. Pratt, called on behalf of defendants, sworn and testified as follows: "I am the daughter of the parties here. I will be eighteen years old next August. I was living at home all the time that Dr. and Mrs. Pratt lived in Los Angeles prior to their separation. I have at different times heard the property matters of the doctor and my mother talked over between them, particularly the Miltimore Tract property, and the rents, profits, and use of it. I don't know as I can give the date. It was at the time we were living on Jefferson Street. *The Court.*—Mr. Carver, there has been no testimony offered as to the amount of those rents and who collected them. *Mr. Carver.*—We wish to offer this testimony as against the statements of plaintiff to the effect that the defendant always got the rents. She says she didn't get them. Our answer is that defendant did get them, and paid them over to plaintiff, and that is what we wish to prove. *The Court.*—Can't you prove it by somebody else than the daughter? I don't know anything more revolting than to have a child put on the witness-stand to dispute a parent, father or mother. . . . You can use your own choice. I just simply say to you that there is no depth of infamy to which people can sink more than to put their children on the stand to testify against father or mother. I don't know anything that would condemn your client in my eyes so completely as to put that girl on the stand to testify against the mother. You would have to bolster everything he (defendant) said to make me believe anything after he did that. I have very pronounced views on it. It is shocking when a child is offered on the witness-stand to testify to anything that a mother has said as true or untrue. *Mr. Carver.*—The defendants except to the statement and ruling of the court. Suppose that the daughter had been on the stand, and the

mother should then take the stand and testify against the daughter. It doesn't seem to me that it makes any difference which one is on the stand first. *The Court.*—Now, you have the whole field; go on. You have the liberty to put this girl on and have her testimony. Ask her this question if you care to. I simply want you to understand that it opens the door to prejudice, which every court must have that has a family. Thereupon the defendants, by reason of the foregoing expressed views and prejudice of the court, were compelled to and did withdraw said witness from the stand."

The affidavit was subscribed and sworn to by the defendant Charles Pratt, his attorney S. A. W. Carver, and by one C. W. Sexton, and was filed, read, and considered on the motion for a new trial. No other affidavits were read upon the hearing of the motion. The bill of exceptions fails to show, nor does it appear otherwise, that any objection was made to this affidavit in the court below. We must therefore presume that it was so received and considered by the court without objection. It is objected here, however, on the part of respondent, that the action of the court in the respect disclosed by the affidavit was not an irregularity, but, if anything, a mere error of law, not to be presented on affidavits. (Code Civ. Proc., sec. 658.) It is perhaps not necessary to determine whether the conduct of the judge amounted to an error of law or not. It may be conceded to have been an error of law, and yet, possessing all the aspects of an irregularity, as it does, it was not amiss to treat it as the ground for a new trial referred to in subdivision 1 of section 657 of the Code of Civil Procedure. (Hayne on New Trial, sec. 29.) As ordinarily understood an error of law is committed when the court, either upon motion of one of the parties or upon its own motion, makes some erroneous order or ruling on some question of law which is properly before it and within its jurisdiction to make. Here, however, the court was not called upon to rule or make an order upon any question of law, but the judge interrupted counsel and undertook to and did in a very irregular way control the conduct of the case on the side of defendant. The trial judge virtually threatened to prejudge the testimony of the defendant as a witness, and intimated that unless the daughter was withdrawn as a witness he would regard the fact of her having contradicted the

mother in the father's interest as a matter seriously discrediting the latter's testimony. The judge certainly had no right thus in advance of hearing the testimony of the father to make up his mind as to the effect that previous testimony ought to have on the weight of his testimony. The testimony of the daughter as offered was competent and proper, and therefore the judge had no right to permit it to arouse in his mind a prejudice against the father. Above all, he had no right by an expression of such prejudice and its threatened results to drive the party to withdraw testimony against which no legal objection existed. The action of the judge was an irregularity. That it was extremely prejudicial to the appellant is made to appear very forcibly when we examine the findings and learn that they are against appellant in every particular to which the proposed testimony of the daughter was directed. There are then two good reasons why the objection of respondent that the matter urged could not properly be presented by affidavit should be overruled: 1. No such objection was made at the hearing of the motion; and 2. The objection would not have been valid if it had been made. The trial of a case should not only be fair in fact, but it should also appear to be fair. And where the contrary appears, it shocks the judicial instinct to allow the judgment to stand.

We find it unnecessary to determine on this appeal whether the statement on motion for new trial was settled in accordance with the provisions of the code or not. Nor will it be necessary to discuss the many questions arising on said statement.

We advise that the judgment and order appealed from be reversed.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

McFarland, J., Lorigan, J., Angellotti, J.

Hearing in Bank denied.

[L. A. No. 1127. Department Two.—December 5, 1903.]

**FIRST NATIONAL BANK OF REDLANDS, Appellant,
v. GERTRUDE S. BOWERS, Respondent.**

GUARANTY TO BANK—DRAFT FOR ORANGES—“BILLS OF LADING ATTACHED”—EVIDENCE OF FACTS AND CIRCUMSTANCES—QUESTION FOR JURY.—A guaranty to a bank of ninety per cent of the face value of all drafts for oranges “with bills of lading attached,” drawn by a fruit company in favor of the bank during a specified orange season, is not sufficiently clear and obvious as to the meaning of the phrase “with bills of lading attached” to justify the court in a construction of it as matter of law, and in refusing to permit the jury, under the evidence disclosing the facts and circumstances surrounding its execution, to determine what the parties intended by those words, the meaning of which was disputed. Such determination was the province of the jury, and not of the court.

IN.—CONSTRUCTION OF GUARANTIES—EXPLANATION—INTENTION OF PARTIES.—Contracts of guaranty, like all other contracts, should receive a fair and liberal interpretation, according to the true import of their language, and may be explained by reference to the circumstances under which they were made and the matter to which they relate, the main object being to ascertain and effectuate the intention of the parties.

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order denying a new trial. Frank F. Oster, Judge.

The facts are stated in the opinion of the court.

Otis & Gregg, and J. S. Chapman, for Appellant.

Edward R. Annable, and Hunsaker & Britt, for Respondent.

LORIGAN, J.—Plaintiff brought this action to recover from the defendant \$12,529.92 upon a contract of guaranty executed by her in its favor.

The trial was had before a jury, and at the close of the evidence the court, over plaintiff's objection, instructed the jury to return a verdict in favor of defendant, which was done, and judgment entered thereon.

Plaintiff moved for a new trial, which was denied, and from the order denying said motion and from the judgment it appeals.

The contract of guaranty upon which the action is brought is as follows:—

“REDLANDS, CAL., Dec. 1, 1897.

“To the First National Bank of Redlands, Cal.

“I hereby guarantee to said bank ninety per cent (90) of the face of all drafts for oranges (with B-L attached), drawn by the Haight Fruit Co., in favor of said First National Bank during the orange season of 1897 and '98.

“GERTRUDE S. BOWERS.”

It was admitted upon the trial that the letters “B-L” were intended by the parties to mean “bill of lading.”

It appears from the evidence, that the Haight Fruit Company, after the execution of such contract of guaranty by defendant, and its delivery to plaintiff, made at different times drafts in favor of plaintiff, upon the respective parties to whom in the various cities of the United States consignments of oranges were shipped; that each of said drafts had attached to it the bill of lading of the particular consignment for which it was drawn on the consignee, and all said drafts were drawn on a printed form used by the Haight Fruit Company, which contained, among other things, the following: “Instructions to the Bank.—This collection covers goods now in your city. Please present for acceptance without delay, but hold until goods arrive, if necessary. Do not return documents unless instructed from California to do so. Permit inspection on track. Deliver bill lading or order on acceptance of draft. If not accepted immediately on arrival of goods, wire direct to Haight Fruit Company, Redlands, California, and follow their instructions.” That all of said bills of lading, attached to said drafts, were either issued by the transportation companies directly to the consignees, or to the Haight Fruit Company, and specially indorsed by it to said consignees; that none of them were either issued, or indorsed to, said bank; that, upon the delivery of said drafts with such bills of lading attached, the plaintiff advanced to the Haight Fruit Company, on the faith of said guaranty, ninety per cent of their face value; that a large proportion

of said drafts accompanied by bills of lading, were drawn by the Haight Fruit Company on its own agents in eastern cities, for the purpose of enabling them to make sale of consignments of oranges described therein, and others were on particular purchasers in different eastern cities. That each of said drafts, with bill of lading attached, was forwarded by the plaintiff to its business correspondent in the city where the drawee and consignee resided for presentment, acceptance, and payment.

It further appears from the evidence that the Haight Fruit Company had a contract with the railroad companies over whose lines its consignments were sent, whereby the fruit company, could, at any time, have said consignments while *en route* diverted from one point to another, or from one consignee to another, or delivered to its agents without the production or surrender of the bills of lading attached to the draft, and that it did so whenever it chose; that all of said drafts sued on were returned to plaintiff by its eastern bank correspondents unpaid, accompanied in all but a few instances by the original bills of lading which were sent; that none of said drafts sued on were presented for payment to the drawees therein; that said plaintiff during said season advanced on said drafts \$130,051.52, all of which was collected from the drawees named therein, save the amounts sued on.

There was also evidence introduced on the part of the plaintiff, tending to prove that the Haight Fruit Company for many years theretofore had been, and at the time of the guaranty in question was, largely engaged in Southern California, at Redlands and its vicinity, in purchasing and shipping oranges to the eastern market.

It owned no orange-groves of its own, but in common with others engaged in the same enterprise the company purchased entire, or partial, crops of oranges from the owners thereof early in the season, while the fruit was on the trees, and long before it had ripened, so as to be ready, when the shipping period arrived, to successfully compete with those engaged in the same business.

That the company was not financially able, on account of the extensive purchases necessary to be made, to command from its own resources sufficient money to pay for these crops, as payments by the owners were required, which were in

advance when the contract of purchase was made, and usually full payment when the fruit was delivered, and was, therefore, compelled to make arrangements so that the capital necessary therefor during the shipping season would be supplied by a bank under some security furnished by a third party, and it was with this end in view that defendant's guaranty was secured, though the matter of its procurement will be referred to more particularly later on.

That the general conduct of the business during the shipping season, both in previous years and during the season for which the guaranty in question was given, required that the company should have, and it did have, agents employed in several of the principal eastern cities, whose duty it was to obtain purchasers and markets for, and to attend to the interests of the company in, the sale of fruit consigned there. These agents would notify the company that they had made the sale to different persons, or firms, of such a number of boxes or carloads of oranges, and thereupon the company would consign to these agents, for delivery to such persons, the required shipments, transmitting at the same time a draft for the purchase price, with bill of lading attached. All shipments were made subject to inspection by the consignees. On the arrival of the goods, in some instances, these consignees would refuse to accept them; a refusal which might, or might not, be based on sufficient grounds,—perhaps the goods were damaged, or a depressed market might make it to the interest of the consignee to refuse acceptance. Be the reason what it might, the consignee thus refusing to accept, the agent of the company at the place of consignment would have to take immediate possession of the fruit and sell it to the best advantage. Under such circumstances, as the consignments were not accepted by the consignees, the drafts against them would not be accepted, and hence not presented.

In other instances orange crops, which the company had purchased, would be ripe, and the owners insistent that they should be gathered and paid for. At this time the eastern market might be depressed and the agents of the company unable to make sales. Under these circumstances, as the fruit could be kept only a limited time after being picked, the cars would be loaded with it, and billed to some agent in a distant city—for illustration, say Boston. While being gotten ready

for shipment, and after the shipment was started on its way to the Boston agents, the company would by telegraph notify such agents, and its other agents in different cities, of the transmission of such unsold consignment, and direct them to look out while the consignment was in transit for a market therefor, because, if the consignment was permitted to reach Boston a sale of it might not be advantageously effected. In response to these notices, it frequently happened that an agent somewhere else,—say at Chicago,—or several agents along the route, would find purchasers for the whole or separate carloads of the oranges. To meet these contingencies, under its arrangement with the railroad company, the consignment directed to Boston would be diverted from its destination to such point where these other agents had procured sales for it. If, for example, this consignment originally destined for Boston should be diverted to Chicago, it would be received and disposed of in that market without either draft or bill of lading, as both these would have gone on to Boston where the consignment was originally billed, but which it never reached.

In other cases, consignments would be made to particular eastern purchasers, with drafts against them for the purchase prices, and accompanying bills of lading. Often these parties would refuse to accept the consignment. Under these circumstances the drafts would not be presented against the consignees. In such cases the consignments would be taken by the agents of the company in the locality, and sold out at retail to the best advantage, and perhaps to a dozen different persons.

In some instances consignments arrived at their destination, and on inspection were found so damaged in transportation as to be of little or any value, and consequently refused.

In some of the instances referred to it would be useless to present the drafts for either payment or acceptance, and in others they could not be, because the consignments had been diverted to points other than the original destination to which the drafts had proceeded.

In all instances, however, where sales were made, whether of consignments diverted from the destinations specified in

the bill of lading and sold by the agents of the company in other cities, or made by agents after the particular consignees had refused to receive the shipments, or accept, or pay the drafts therefor, the proceeds were turned in to the credit of the drafts drawn, to the extent that anything was realized.

The business of the company was not only conducted in this manner during the seasons previous, but similar methods were employed and like transactions arose during the season to which the guaranty of defendant applied. The evidence not only showed these facts, but there was likewise evidence tending to show that the defendant was fully informed of the way in which the business was theretofore conducted, understood all about it, and that it was intended to be transacted under her guaranty, in the same manner.

This guaranty was given by her in furtherance of the interests of her nephew, who desired to purchase an interest in the fruit company. To this end she advanced him the money to purchase stock in the Haight Fruit Company, and at the same time agreed to advance that company money from time to time as required in the transaction of its business. This she did for some time personally, but shortly after the shipping season opened an arrangement was made by her, with the officers of the plaintiff bank, which resulted in the execution and delivery of the contract of guaranty sued on. There was additional evidence upon all these matters given in the case, but we have set forth this much as sufficient under which to discuss the principles of law which we deem applicable. The main and important question on this appeal, and the only one which it will be necessary to consider, is the correctness of the action of the court in instructing the jury, in the face of the recited and similar evidence, to return a verdict for the defendant. The giving of this instruction is the principal ground for reversal urged by appellant.

We are not clearly advised from the record upon what ground the lower court based this instruction to the jury. It must have done so, however, by construing the contract of guaranty as meaning in the use of the term "bill of lading attached," that such bills of lading as accompanied the drafts should have been transferred to the bank by the Haight Company, so as to operate as a pledge of the oranges against which such drafts were drawn, and as security for the benefit

of the guarantor, and by such transfer to place the consignment under the absolute control of the bank and beyond the control of the drawer—the Haight Fruit Company; that this was a condition precedent to her liability under the guaranty, and not having been complied with, such liability never attached; or, the court may have based its instruction on the fact that the drafts sued on were never presented to the drawees for acceptance, and hence if any liability ever did attach, this failure on the part of the plaintiff to so present them relieved and exonerated her from responsibility. The action of the court on the record cannot be defended on any other grounds, and we have no doubt that the court based its instruction on the first, because this is the proposition to which the briefs of counsel on both sides are principally addressed.

Respondent's contention in the court below was, and the view which the lower court took of the contract of guaranty, by refusing to permit the jury to take into consideration the facts and circumstances attending and surrounding its making, as disclosed by the evidence, for the purpose of determining the meaning of the term "bill of lading attached," as used in the contract, must have been, that the language of the contract on this subject was plain and obvious, and not open to any examination or investigation by the jury under a consideration of such facts and circumstances; that by its terms the contract of guaranty plainly provided that the bank should with all drafts discounted by it, have taken as security therefor a valid pledge of each consignment of oranges, against which the draft was drawn, by having the bill of lading therefor either issued, or transferred to itself, and retain exclusive control over the consignment, and that, as not only were none of these bills of lading drawn in favor of, or assigned to the plaintiff, but it cashed drafts which, on their face, all expressly reserved to the company the control of the consignments represented by such bills of lading, the defendant was not liable. We cannot, however, agree with the lower court in this view. We do not perceive that the terms of this guaranty were so plain, or the meaning so certain, as to warrant the court in itself construing the instrument, and refusing to permit the jury, under the evidence disclosing the facts and circumstances surrounding its exe-

cution, to determine what the parties intended by its disputed terms.

To sustain the view taken by the court, it was certainly necessary to import into the language which was used by the parties, terms which were plainly not expressed therein, and which could only exist as a matter of construction.

The court construed the contract upon its face as a plain, clear guaranty, which was not affected by any of the facts and circumstances attending its execution; either the situation of the parties, or the object to be attained, or subject to be construed under any of the aids which the law affords for the interpretation of contracts.

There is nothing expressly said in the contract of guaranty about the plaintiff taking bills of lading as a pledge, or retaining control over them as security for the drafts cashed. There is nothing in the terms used wholly inconsistent with permitting the Haight Fruit Company to control the disposition of the consignments represented by the bills of lading. If there is, it is only by construction. On the face of the guaranty there is nothing said as to who shall have the control of the oranges. Nor is it obviously apparent therefrom, that the requirement that bills of lading should be attached to the drafts, was for any other purpose than to serve as a guide to the plaintiff in determining whether the drafts presented by the company should be cashed by it, or not. No drafts could be cashed except for oranges—no other shipments of fruit—and the bill of lading would furnish, and might possibly be intended to furnish, the best information, that the drafts were for consignments of oranges represented thereby, as the guaranty contemplated they should be. It was a question, whether the bank was required under the contract, to do any more than to see that there was a bill of lading accompanying each draft, professing on its face in the ordinary form of such documents to represent a consignment of oranges. It was also a question, whether it was intended that the turning over of these bills of lading with the drafts was for any other purpose than that the plaintiff through its correspondents might receive the proceeds of the sale of the fruit made by the company in payment of the discounts

made on the drafts therefor. On the other hand, for the court to construe the phrase "bills of lading attached" to mean that such bills were required to be made out in favor of, or indorsed to plaintiff, and held, retained, and dealt with as pledges securing the drafts, with all the responsibilities and liabilities to be assumed by the plaintiff under such condition, was to incorporate into the instrument, by construction, more than it expressly contains, and to give it an effect which, on its face, it is not disclosed the parties contemplated.

We do not say that this may not have been the intention, but it does not clearly or obviously follow from the language of the guaranty, and in the dispute between the parties as to its meaning, this could only be properly determined by a consideration of all the facts and circumstances surrounding its execution, and in the case at bar this was the province of the jury and not of the court.

That the defendant herself did not think that the construction placed by the court upon this contract was so obvious or apparent is disclosed by her answer, in which she sets forth that it was understood by the terms of said contract that a lien would be created against said oranges represented by said bills of lading. It was the determination of this question, as to what was the meaning of the term "bill of lading attached," that the appellant insists should have been submitted to the jury under all the evidence, and in this we think appellant was right. Contracts of guaranty are not affected by rules different from those employed in construing other contracts, but, like all other contracts, should receive a fair and liberal interpretation, according to the true import of their language, and may be explained by reference to the circumstances under which they are made and the matter to which they relate. (Civ. Code, sec. 1647.) "As guaranties are contracts of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold the party bound to the full extent of what appears to be his engagement. Letters of guaranty are commercial instruments, generally drawn up by merchants, sometimes inartificial and often loose in their structure and form. They should not, therefore, be construed with nice

and technical care; but, according to the facts and circumstances accompanying the transaction, holding in view as the main object to ascertain and effectuate the intentions of the parties." (2 Daniel on Negotiable Instruments, p. 791.) The rule is correctly stated in *Mauran v. Bullus*, 16 Pet. 533, where the court say: "The questions in this case arise on the instructions of the court; and they very properly, as we think, refer the jury to the facts and circumstances under which the guaranty was given. It is only by such reference that that instrument can be correctly understood and construed. In the construction of instruments, to ascertain the intention of the parties is the great object of the court; and this is especially the case in acting upon guaranties." In *Thompson v. McKay*, 41 Cal. 228, the court says: "The rule is well established that, in construing doubtful instruments, they must be interpreted in the light of the surrounding circumstances. After ascertaining the relation of the contracting parties to each other, and the subject-matter of the contract, the court will, if possible, so construe the instrument, however inartificially drawn, as to give effect to the intention of the parties, provided it can be done without disregarding the language of the instrument, when all its parts are considered." To the same effect are *Walsh v. Hill*, 38 Cal. 481; *Lafargue v. Harrison*, 70 Cal. 385;¹ *London etc. Bank v. Parrott*, 125 Cal. 472;² *McCusland v. O'Brien*, 57 Ill. App. 636; *Wills v. Ross*, 77 Ind. 1;³ *Crest v. Burlingame*, 62 Barb. 351; *Bell v. Bruen*, 1 How. 169; *Lee v. Dick*, 10 Pet. 482; *Graham v. Farmers' etc. Bank*, 116 Cal. 466. The purpose to be subserved by this rule is to place the court, or jury, in the position of the parties at the time the contract was made, and enable it to intelligently interpret the language used by them. Facts which tend to illustrate or explain the language used in the contract, and to place the court or jury as nearly as may be in the situation of the parties as they contracted, are always admissible when the meaning of the terms used is debatable. Under these principles the plaintiff had a right to have submitted to the jury the question of what was intended, understood, and meant by the parties in the use of the term "bill of lading attached." It was for the

¹ 59 Am. Rep. 416.² 40 Am. Rep. 279.³ 73 Am. St. Rep. 64.

jury to determine whether it was intended by the use of this term, that all such bills of lading should be issued in favor of the bank, or transferred to it by the Haight Fruit Company, so as to operate as a pledge of the consignment of oranges, to be held as security for the benefit of defendant, to the extent of her liability on the accompanying draft; whether it was intended thereby to divest the fruit company of all control over these consignments, and to require the bank thereafter to retain absolute and exclusive control of them for all purposes; not only to require payment of the drafts by the consignees, but upon failure to do so to employ agents or brokers at the point of destination to dispose of the consignments, or to take such other measures as the law requires concerning the disposition of pledged property.

Or, on the other hand, did the attending facts and circumstances show that no pledge of the oranges or indorsement of the bills of lading to plaintiff as security for the drafts was contemplated or intended, and that it was the intention of all parties that the method of dealing, and the manner of conducting business, as theretofore done by the fruit company, and claimed to have been known by the defendant, including the control and disposition by said company of these consignments represented by the bills of lading, was to be continued under the guaranty.

This was a matter for the consideration of the jury. It was for them to determine the extent and the meaning of the contract, as the facts and circumstances surrounding its execution disclosed the intention of the parties.

If the jury should find that it was intended that the business under the guaranty should be conducted as previously done, and that the control of these consignments should, as theretofore, remain with the fruit company, and that it should have the disposition of them as the exigencies and necessities of the business should require, that no pledge or security by transfer of the bill of lading to the bank was contemplated, then there was no obligation imposed upon the plaintiff under the guaranty which it failed to perform, and the fact that the plaintiff failed to present the drafts sued on to the drawees named therein was of no moment, because all these drafts were against consignments, either diverted by the company from the original consignees, or were against

consignments refused by the drawees, and taken possession of by the company's agents and sold, and under such circumstances it would have been an idle and useless ceremony to have presented the drafts for payment, and plaintiff was not required to do so.

Much argument is advanced on both sides why this contract should be construed under the view that each party takes of it. It is not our province to enter into any discussion of that matter.

These arguments will be properly addressed to the jury when the matter of the interpretation of the contract is submitted to them under the evidence. What we now hold is, that the court should not have taken that matter from the jury, but, under proper instructions, have submitted it to them for their determination under all the evidence.

The order denying a new trial is reversed and the cause remanded.

McFarland, J., and Angellotti, J., concurred.

Hearing in Bank denied.

[Sac. No. 948. In Bank.—December 8, 1903.]

WESTERN UNION TELEGRAPH COMPANY, Appellant,
v. COUNTY OF SAN JOAQUIN, Respondent.

ACTION FOR TAXES PAID UNDER PROTEST—ASSESSMENT OF CITY FRANCHISE—FEDERAL FRANCHISES—INSUFFICIENT COMPLAINT.—A complaint in an action to recover taxes paid under protest, which shows an assessment upon a franchise granted by a city, and avers that plaintiff holds federal franchises which are non-taxable, and is an instrument of the federal government, and that the assessment was void, but does not aver that plaintiff did not receive a franchise granted by such city, does not state a cause of action.

ID.—POWER OF CITY.—It cannot be held as matter of law that the city could not grant and that the plaintiff could not receive a franchise which is different from and in addition to the franchises granted to it by the federal government.

APPEAL from a judgment of the Superior Court of San Joaquin County. Joseph H. Budd, Judge.

The facts are stated in the opinion of the court.

George H. Fearons, R. B. Carpenter, and Arthur L. Levinsky, for Appellant.

A. H. Ashley, for Respondent.

McFARLAND, J.—This is an appeal by plaintiff from a judgment in favor of defendant.

The action is brought to recover \$29.50 paid under protest for taxes alleged to have been unlawfully assessed against appellant. A demurrer to the complaint was sustained, and, appellant declining to amend, judgment went for respondent.

The complaint sets forth the history and character of the appellant corporation, its lines of telegraph through the state and San Joaquin County, etc.,—matters of general knowledge. It is particularly averred that by an act of Congress passed July 24, 1866, and appellant's acceptance of the privileges and duties contained in and imposed by said act, it became an instrument of the federal government, and acquired certain federal franchises, among others, to construct and maintain its lines over the public domain, and along any of the military or post roads of the United States; that being thus an instrumentality of and having franchises granted by the federal government, such franchises cannot be taxed by the state or any of the municipalities; and that the tax here involved was upon its franchise and therefore unlawful and void.

Appellant relies on the case of *San Francisco v. Western Union Telegraph Co.*, 96 Cal. 140, and the numerous decisions of the supreme court of the United States there cited. There is no doubt that in those cases it was firmly established that the federal franchises held by appellant cannot be taxed

by the state, and we have no disposition whatever to question them; but the complaint in the case at bar does not bring appellant's asserted rights here involved within the principle of those cases, because it does not appear that any federal franchise of appellant was assessed. The averment is, that the assessor assessed a "franchise granted by the city of Stockton." It is averred that appellant had not and had never received "any franchise of any kind or description from the state of California or from the county of San Joaquin"; but there is no averment that appellant did not receive a franchise from the city of Stockton. Possibly such averment was not made because it could not have been truthfully made. There is a reference, by way of recital, to the circumstance of the assessor well knowing that the franchise was imaginary and fictitious, followed immediately by the averment "that said *county* had never granted or pretended to grant any franchise of any kind to plaintiff"; but there is no averment that the city of Stockton never granted any franchise to plaintiff. We cannot hold that, as matter of law, the city could not possibly have granted to appellant, or that the latter could not possibly have received from the city, a franchise different from and in addition to the franchises granted to the appellant by the federal government. The complaint, therefore, does not state facts sufficient to constitute a cause of action, and the demurrer was properly sustained.

The judgment appealed from is affirmed.

Angellotti, J., Van Dyke, J., Shaw, J., Henshaw, J., Beatty, C. J., and Lorigan, J., concurred.

[S. F. No. 3785. In Bank.—December 8, 1903.]

B. MCGORRAY, Petitioner, v. SUPERIOR COURT OF
SAN JOAQUIN COUNTY, Respondent.

JUSTICE'S COURT—JURISDICTION—WAIVER OF OBJECTION.—Under the terms of subdivision 4 of section 890 of the Code of Civil Procedure, the objection that the action has not been commenced in the proper township is waived, if not taken at the trial.

ID.—WRIT OF REVIEW—INSUFFICIENT PETITION.—A petition for a writ of review to annul a judgment of the superior court rendered on appeal from the judgment of a justice's court, on the ground that it does not appear from the complaint in the justice's court that the action was commenced in the proper township, which does not allege that an objection to the jurisdiction of the justice of the peace was taken at the trial, or at all, is insufficient.

PETITION for Writ of Review to annul the judgment of the Superior Court of San Joaquin County rendered upon appeal from a Justice's Court. F. H. Smith, Judge.

The facts are stated in the opinion of the court.

A. H. Carpenter, and Joshua B. Webster, for Petitioner.

Arthur L. Levinsky, for Respondent.

THE COURT.—The petition for a writ of review shows that the defendant was sued in a justice's court upon a contract for the payment of money, that he was served with summons and answered the complaint, that judgment was entered against him, that he appealed to the superior court on questions of law and fact, where, after a retrial, judgment was again entered against him. He contends that this judgment is void, because it does not appear from the complaint in the justice's court, the docket, etc., that the action was commenced in the proper township, and consequently that the justice of the peace had no jurisdiction originally, and the superior court no jurisdiction on the appeal except to dismiss the action. It is not alleged that any objection to the jurisdiction of the justice of the peace was taken at the trial or at all, and it is expressly provided by subdivision 4 of section 890 of the Code of Civil Procedure that the objection that an action has not been commenced in the proper township is waived, if not taken at the trial. This section must be considered in connection with section 832 of the Code of Civil Procedure, and it provides for a mode of waiving objection to the jurisdiction fully as effective as a voluntary appearance without summons.

Writ denied.

[S. F. No. 3556. Department One.—December 9, 1903.]

LEE KENWORTHY, Contestant, Appellant, v. C. I. MAST,
Contestee, Respondent.

ELECTION—DELAY IN OPENING POLLS—PRECINCT VOTE NOT INVALIDATED.

—A precinct vote is not invalidated entirely merely because of delay in opening the polls, where the officers acted without fraudulent intent, and only one voter appears to have failed of voting by reason of the delay, whose vote could not have changed the result of the election.

ID.—TEST APPLIED TO DEPARTURES FROM LAW.—The true test to be applied to departures from the requirements of the laws regulating the conduct of elections on the proper day and at the proper place, whether the requirements are mandatory or directory, is as to whether or not the particular departure is of such a nature as to make it impossible or extremely difficult to determine, under the circumstances of the case, whether fraud had been committed or anything done which would affect the result.

ID.—PRESUMPTION AS TO POPULATION.—There is no presumption that a township had a population entitling it to two justices of the peace, and where the pleadings of both parties justify it, it will be presumed after judgment that the township by reason of its population was entitled to one justice of the peace.

ID.—DECISION UPON APPEAL—FINDING AGAINST EVIDENCE—NEW TRIAL.—Where a finding of the superior court as to malconduct of the election board was not sustained by the evidence as to one precinct, which was decisive of the election, this court cannot order final judgment, but will order a new trial, in which the court will determine the case in accordance with the views expressed by this court.

APPEAL from a judgment of the Superior Court of Mendocino County. J. Q. White, Judge.

The facts are stated in the opinion of the court.

Arthur J. Thatcher, and J. C. Ruddock, for Appellant.

Thomas, Pemberton & Thomas, for Respondent.

ANGELLOTTI, J.—This is an election contest. Contestee had judgment, from which the contestant appeals. Contestant and contestee were candidates for the office of justice of the peace of Little Lake Township, Mendocino County, at the last general election. As shown by the official canvass of the

board of supervisors, contestee received two hundred and sixteen votes and contestant two hundred and twelve votes, and the former was declared to be elected. Contestant instituted this contest, and the hearing before the superior court resulted in showing that he received one hundred and seventy-three votes and contestee one hundred and sixty-one, which would have given contestant the office but for the rejection by the trial court of the entire vote of two precincts, in each of which contestant had a majority,—to wit, Little Lake Precinct No. 1, in which he had a majority of ten, and Little Lake Precinct No. 2, in which he had a majority of fourteen. Rejecting the total vote of these two precincts, the contestee was elected by twelve votes. The court found that the officers of election in the several precincts were not guilty of any misconduct or malconduct (other than the improper counting for both plaintiff and defendant of certain ballots improperly marked, which errors were rectified by the court in the recount), except that in the rejected precincts the polls were not opened by them at six o'clock A. M., as required by the statute. As to Little Lake Precinct No. 1, it was found that the polls were not opened until 8:10 A. M., and as to Little Lake Precinct No. 2, that the polls were not opened until 7:45 A. M. It was also found that there was no sufficient cause or excuse for the failure to open the polls on time in either precinct. It was further found that in Little Lake Precinct No. 1 there were two hundred and ninety-five registered voters, of whom two hundred and thirty-seven deposited their ballots, and that in Little Lake Precinct No. 2 there were one hundred and eighty registered voters, of whom one hundred and forty-one voted; and further, "that it is not shown and cannot be determined in either precinct how much or in what way the total vote, or the relative vote, for the respective candidates for justice of the peace was affected by this failure and neglect of the election officers to open the polls at the proper time." It is claimed by contestant that the court was not justified in rejecting the vote of these precincts, and the findings of fact, in this behalf, are properly attacked by the specifications of insufficiency of evidence to sustain the same.

If the vote of Little Lake Precinct No. 2 was improperly rejected, the contestant was elected by a plurality of two. We are of the opinion that whatever may be said as to the

other precinct, the evidence was not such as to justify the rejection of the vote of Little Lake Precinct No. 2.

It is not intimated that there was any fraud or collusion on the part of the officers of this precinct. The contestee himself testified that he swore in the election board thereof at the hour of 7:15 A. M., and that he did not know of anybody losing his vote by reason of the polls not being opened in time, unless one George Hall failed to vote for that reason. One of the election officers of this precinct testified (and his testimony was uncontradicted in any particular) that he opened the polling-place at six o'clock, and that from that time until the opening of the polls he and at least four others of the election board were continually present; that they were at work putting up the booths and making other preparations for the election. He further testified, without contradiction, "No one offered to vote before we were ready to receive votes. I was there all the time. . . . I do not know of any elector in Little Lake Precinct No. 2 who was deprived of his right to vote by reason of the delay that morning, in opening the polls." This witness further testified positively that the officers were sworn in before seven A. M., and that the proclamation was made earlier than 7:45, but upon these points there is some conflict of testimony. While the testimony shows a delay in opening the polls that intelligent and prompt effort on the part of the officers would have avoided, it is clear therefrom that they acted without fraudulent intent, and the circumstances attending the irregularity were such that it could easily be determined that neither the total vote nor the relative vote for the respective candidates for justice of the peace was affected by the delay, except that possibly one man was caused to lose his vote thereby. The evidence indicates that very few persons were in the neighborhood during the early morning prior to the opening of the polls, and no reason is apparent why it could not be shown to a certainty whether or not any one left without voting. No one except the contestee knew of any such a one, and he could suggest only the name of Hall. Conceding that Hall did fail to vote because of the delay in opening the polls, and, further, that he would have voted for contestee, the result would not be materially affected, for contestant would still have a majority of one.

It is said that the provisions as to time and place of holding an election are mandatory, and that the departure from those requirements was in this case so substantial as to forbid any inquiry as to whether or not any injury resulted. That a literal compliance with the provisions of the law as to the hour of opening the polls is absolutely essential to the validity of the vote of a precinct has never been held in this state, and no good reason can be conceived for so holding. Learned counsel for respondent admit that even the disobedience of a mandatory statute must be liberally construed, and that, if the departure therefrom is slight, and it can easily be determined that no injury resulted therefrom, the vote will not be rejected. It was said by this court in *Atkinson v. Lorbeer*, 111 Cal. 419, 421: "Of course, neither the voters nor those voted for have any control over election officers, and to set aside the vote of a precinct, when there was clearly no fraud or any mistake affecting the result, for mere irregularities occasioned by the ignorance or carelessness of election boards would, in many cases, be a patent injustice. Moreover, a construction requiring an exceedingly strict compliance with all statutory provisions might tempt to irregularities contrived for the very purpose of vitiating the vote at a certain polling-place, and as was said in *Whipley v. McKune*, 12 Cal. 361, 'might lead to more fraud than it would prevent.' "

On the other hand the election laws should not be so construed as to open the door to future frauds which it is the purpose of those laws to prevent. It is practically impossible to lay down any general rule covering all cases, but we think the true test to be applied to departures from the requirements of the laws relating to the conducting of elections on the proper day and at the proper place, be those requirements called mandatory or directory, is as to whether or not the particular departure is of such a nature as to make it impossible or extremely difficult to determine, under the circumstances of the case, whether fraud had been committed or anything done which would affect the result. If, as was said in *Atkinson v. Lorbeer*, 111 Cal. 419, speaking of a departure from a so-called "directory" provision, it may be easily shown that the departure was not accompanied with fraud or any act affecting the result, and such showing is made, the

vote will not be rejected. If, on the other hand, the departure from the law is so gross as to give rise to a suspicion of fraud or unfairness, and the circumstances are such that in the nature of things no evidence as to the effect thereof could be satisfactory, a court will not enter upon the task of inquiry.

In *Packwood v. Brownell*, 121 Cal. 478, it was held by this court, reversing the action of the lower court in rejecting a precinct, that a specification of malconduct as follows, viz.: "That the said board of judges of election . . . did not open the polls at sunrise of said day of election, nor keep the polls open for the length of time required by law," did not sufficiently show malconduct justifying the rejection of the precinct. This decision was reached in the face of the facts shown by the findings of the trial court, that while the polls should have been opened at 6:29 A. M., they were not opened until 8:15 A. M., or 8:30 A. M., and that one qualified elector was deprived of the opportunity to vote by the failure of the board to open the polls earlier. It was said in the opinion in that case that the legislature intended that some margin should be allowed for honest effort to comply with the statute, and did not intend that the vote of any precinct should be invalidated because the polls were not open at the very instant of sunrise. The chief justice, in a concurring opinion, while holding that the requirements as to time and place of holding an election are mandatory, said that time in this connection means the proper day for holding the election, and that a slight delay in opening the polls, explained and excused by the absence of one of the officers and by the necessity of setting up the booth, railings, etc., ought not to disfranchise the voters of a precinct, in the absence of any showing of actual injury. In *People v. Prewett*, 124 Cal. 7, 12, where it was contended that a finding that the polls were opened at one o'clock P. M. was not sustained by the evidence, which, it was urged, showed that they were not opened until 1:30 P. M., this court said: "But if the finding had been as appellants contend it should be, it would not affect the judgment, as no one was prevented from voting by the delay, which seems to have been caused by the failure of the inspector and judges to attend, the selection of others, and procuring a box to serve as a ballot-box." The general rule, as stated in *McCrary on Elections* (sec. 165), is, that in the absence of

a provision in the statute expressly declaring that a failure in this respect shall render the election void, it will be regarded as so far directory only, and that, unless the deviation from the legal hours has affected the result, it will be disregarded; but that if such deviation is great, or even considerable, the presumption will be that it has affected the result, and the burden will be upon him who seeks to uphold the election to show affirmatively that it has not.

If the circumstances are such that this cannot be clearly and satisfactorily shown, the precinct must, of course, be rejected. The cases relied on by the contestee are not against our conclusion in this case. In *Tebbe v. Smith*, 108 Cal. 101,¹ the polls of the rejected precinct were not opened until ten o'clock A. M., instead of at 6:31 A. M. In addition to this, the officers adjourned at noon to another place for dinner, taking the ballot-box with them, but leaving all the other materials, including the official unused ballots, in the polling-place. These departures, considered together, were held to be too radical to allow inquiry as to the effect. In *People v. Hill*, 125 Cal. 16, the polls in two precincts were closed one hour and six minutes too soon. As suggested by the chief justice in his concurring opinion in *Packwood v. Brownell*, 121 Cal. 478, delay in opening the polls is a much less serious irregularity than a premature closing of them. Where, in the latter case, any considerable number of electors have failed to vote, it would be practically impossible to satisfactorily show, under ordinary circumstances, that they would not have voted if the polls had remained open. Be this as it may, there was in that case no suggestion of any attempt to make a showing of absence of injury, and the case was decided upon the bald fact of the premature closing of the polls.

In the case of *People v. Seale*, 52 Cal. 71, the notice given of an election to vote a tax stated that the polls would be open only between the hours of one o'clock P. M. and six o'clock P. M., and the polls were in fact kept open only between those hours. The law required the polls to be kept open, at such an election, from sunrise until sunset, and required the notice of election to specify the legal time. There was

¹ 49 Am. St. Rep. 68.

in that case no notice, as required by law, of a legal election to be held, it being a special election to impose a tax, and any election thereunder was necessarily void.

In *Directors etc. v. Abila*, 106 Cal. 365, it was held that a premature closing of the polls rendered a bond election nugatory. There was in that case evidently no attempt to show want of injury, as is apparent from a reading of the opinion of the court.

The point is made on this appeal for the first time that the statement of contest was fatally defective, in that it did not appear therefrom that the township was not entitled to two justices of the peace. If it was entitled to two, both contestants and contestee were elected. The law in force (Stats. 1901, p. 686) provided that "except as otherwise provided in this act, the officers of a township are two justices of the peace . . . and in townships having a population of less than six thousand, there shall be but one justice of the peace."

This proceeding was apparently maintained, defended, and decided upon the theory, that only one justice of the peace was to be elected for Little Lake Township. It is alleged in the statement that contestant received the highest number of votes for said office, and that by reason thereof he was elected thereto, and that the contestee was not elected to said office. The contestee, in his answer, alleges that he received the highest number of votes for said office, and was elected thereto, and, admitting by his failure to deny the allegations of the statement in regard thereto, that he and contestant each had more votes than the only other candidate, denied that contestant was elected to said office or has any right to hold the same. There is no presumption that the township had a population of six thousand or more, or less than six thousand, unless the fact that the total vote for justice of the peace in the township was only four hundred and sixty-five provides a basis for such presumption, and we are justified by the pleadings in assuming after judgment, that the township, by reason of its population, was entitled to only one justice of the peace.

It will be observed that this objection, if applicable at all, can be considered only with reference to the statement of the grounds of contest, for in all other respects the statement literally complies with the requirements of section 1115 of

the Code of Civil Procedure. "No statement of the grounds of contest will be rejected, nor the proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which such election is contested." (Code Civ. Proc., sec. 1117.)

It is suggested by counsel for contestant that, in the event of a reversal, final judgment should be ordered for him without the necessity of a further hearing in the court below. It has been suggested in several decisions that it is incumbent on the respondent in this class of cases to incorporate his exceptions to the ruling of the court in the bill of exceptions by way of amendment, so that this court may finally determine the matter. His failure to do so would not, in a proper case, prevent this court from making a final disposition of the contest. (See *Farnham v. Boland*, 134 Cal. 151; *Patterson v. Hanley*, 136 Cal. 265.) We cannot, however, in the face of the finding of the trial court that the election officers were guilty of willful malconduct, and that it is not shown and cannot be determined how much or in what way the vote was affected thereby, order final judgment. That finding, at least so far as Little Lake Precinct No. 2 is concerned, is not, in our opinion, sustained by the evidence. It is unnecessary to discuss the matter of the other rejected precinct, as, in the event of a retrial, the lower court will determine the question as to whether or not it should be rejected, in accordance with the views herein expressed.

The judgment is reversed and the cause remanded.

Shaw, J., and Van Dyke, J., concurred.

[L. A. No. 1134. Department One.—December 9, 1903.]

WILLIAM O. McCLINTOCK, Respondent, v. VICTORIA HUDSON et al., Appellants.

WATER RIGHTS—PERCOLATING WATER—FINDINGS—SUFFICIENCY OF EVIDENCE—EXCAVATION IN PERMEABLE MATERIAL—DIMINUTION OF STREAM.—Though the evidence tends very strongly to show that a tunnel and excavation by the plaintiff in permeable gravely ma-

terial near the bed of a stream took part of the subterranean flow of the waters of the stream, constituting part of the stream; yet where the findings that the tunnel took only percolating water from plaintiff's land, and that it did not diminish the supply of the water to which the defendants were entitled, were contrary to the evidence, which showed clearly, without conflict, that the stream was substantially diminished thereby to the injury of the defendants, and that the water was taken beyond the lines of the land from which it was taken, the plaintiff had no right to a decree declaring him to be the absolute owner of the water thus taken, or quieting his title thereto.

Id.—UNDERGROUND WATER.—Under the rule established in *Kats v. Walkinshaw*, ante, p. 116, with respect to percolating water, it is not lawful for one owning land bordering on a stream to excavate in his land, intercept percolating water therein, and apply it to any use other than its reasonable use upon the land from which it is taken, if he thereby diminishes the stream to the damage of others having rights therein.

Id.—RIGHTS IN PERCOLATING WATER.—An owner of land adjoining a stream, who, by excavations in his land, takes percolating water therefrom, and to that extent diminishes the stream, has no greater rights to the water thus taken from the stream than he would have if the water were taken directly from the stream.

Id.—DUTY OF COURT—AMOUNT OF DIMINUTION.—It was the duty of the court to have found from the evidence that the taking out of the water through plaintiff's excavation and tunnel caused a diminution of the stream, and then to ascertain and state the amount of the diminution.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. D. K. Trask, Judge.

The facts are stated in the opinion of the court.

Charles H. McFarland, for Appellants.

The plaintiff had no right to divert the waters of the stream through his tunnel, on the theory that it was percolating water. (*City of Los Angeles v. Pomeroy*, 124 Cal. 597; *Smith v. Brooklyn*, 46 N. Y. Supp. 147; *Van Wickley v. Brooklyn*, 118 N. Y. 4; *Burroughs v. Satterlee*, 67 Iowa, 396;¹ *Hale v. McLea*, 53 Cal. 581; *Saddler v. Lee*, 66 Ga. 45.²)

John D. Pope, for Respondent.

Waters filtrating or percolating in the soil belong to the owner of the soil, and he may use them as he chooses. (*Han-*

¹ 56 Am. Rep. 350.

² 42 Am. Rep. 62.

son v. McCue, 42 Cal. 303;¹ *Painter v. Pacific L. and W. Co.*, 91 Cal. 74; *Southern Pacific R. R. Co. v. Dufour*, 95 Cal. 369; *Gould v. Eaton*, 111 Cal. 639;² *Sullivan v. Northern Spy Min. Co.*, 11 Utah, 438; Gould on Waters, sec. 280, and cases cited.) *Katz v. Walkinshaw*, ante, p. 116, is not intended to overrule these authorities. Water under the surface of the earth is presumed to be percolating water. (*Hansen v. McCue*, 42 Cal. 303;¹ *Tampa Waterworks Co. v. Cline*, 37 Fla. 586;³ *Metcalf v. Nelson*, 8 S. Dak. 87;⁴ Kinney on Irrigation, sec. 49; Gould on Waters, sec. 281.)

SHAW, J.—Judgment was given in the court below in favor of the plaintiff. The defendants moved for a new trial, and their motion having been denied, they now appeal from the order denying the same.

The complaint alleges that the plaintiff is the owner of a certain tract of land in Los Angeles County, and of all the subterranean water flowing therein and percolating through the soil thereof; that the plaintiff has made an excavation and constructed a tunnel, whereby a portion of the subterranean waters percolating through the soil is collected; that the excavation and the tunnel and the waters thereby collected are entirely upon the land described, and are the property of the plaintiff, and that the defendants claim some right or title to the subterranean waters in the land which is without foundation. Whereupon they ask that their title to the property be quieted. The land described in the complaint comprises about thirty-five or forty acres.

The defendant answered, denying the allegation that the plaintiff owns the subterranean waters flowing and percolating in the soil of the land described, and alleging that the land of the plaintiff, and also a number of tracts of land owned by the defendants respectively, each border upon and are riparian to a certain stream of water known as San Jose Creek, which is a stream carrying during the dry season about five hundred miners' inches of water; that the plaintiff and the defendants, in connection with other riparian owners, were each entitled to use a portion of this water for the irri-

¹ 10 Am. Rep. 299.

² 52 Am. St. Rep. 201.

³ 5 Am. St. Rep. 262.

⁴ 59 Am. St. Rep. 746.

gation of their respective tracts of land; that all the water of the creek was necessary for that use, and that all the parties, including the plaintiff, had for many years diverted all the water of the creek and used the same for irrigation of their respective tracts of land; that the plaintiff, by means of the excavation and tunnel mentioned in the complaint, had collected together within his said tract of land a stream of water amounting to about one hundred miners' inches of water, which was composed of the percolating and subterranean waters flowing through and under the plaintiff's land; that this water so collected had been taken out by the plaintiff and carried to land which does not belong to him, and which is not riparian to the said creek, and which has no right whatever to any of the waters of the creek; that if this water so collected is allowed to be taken out by the plaintiff, the amount of water flowing below in the bed of the creek will be diminished by the amount that is so collected by the tunnel, and that the defendants will thereby be deprived of the right to use that amount of the water flowing in the creek. The same allegations are repeated by way of cross-complaint, and there is a prayer that the plaintiff be enjoined from continuing to gather and divert the water by means of his tunnel.

The court finds that the waters collected and gathered by the tunnel, and flowing out of the same, consist of waters percolating in the soil of the plaintiff's land, and do not constitute any part of the waters of the creek; that there is not, and has not been, at any time any subterranean stream or streams, or any other waters, surface or subterranean, in the land of the plaintiff which contributed in any manner to the flow of the creek; that the defendants owned no part of the waters gathered or collected by the plaintiff by means of the tunnel and excavation, and that the taking of the water by the plaintiff through the tunnel and excavation did not diminish the supply of the water to which the defendants were entitled. The defendants upon the motion for new trial question the sufficiency of the evidence to sustain the findings that the tunnel does not take water from the San Jose Creek, that it does not take subterranean water which contributes to the flow of the creek, and that no part of the

waters taken by the tunnel is owned by the defendants, or either of them.

The answer was filed a few days after the decision of this court in *Los Angeles v. Pomeroy*, 124 Cal. 597, and the trial took place a few months thereafter. It is quite evident from the proceedings in the course of the trial that the theory of the defendants at that time was that San Jose Creek was a stream consisting of water flowing upon the surface, resting upon and supported by a body of water permeating the ground under the same, and constituting a part of the stream, similar to that considered in *Los Angeles v. Pomeroy*, 124 Cal. 597. The court and counsel on both sides seem to have treated the case as presenting the question whether or not the percolating waters obtained by means of the tunnel in plaintiff's land was part of an underground flow which formed a part of the stream known as San Jose Creek.

The evidence tends very strongly to show that it did constitute a part of that watercourse. The topography of the country and the situation of San Jose Creek, with the character of its bed, are alone almost sufficient to prove this fact. San Jose Creek at that point, when there is any water flowing in it at all, runs in a shallow channel, situated in the bottom of a gulch, or ravine, about one hundred feet wide, with banks something over twenty feet in height. This gulch, or ravine, has, in close proximity on each side, a range of hills. Above, in the same valley, the ranges of hill separate and form a considerably wider valley, so that the entire watershed contributing to the flow of the creek comprises, according to the testimony, some seventy square miles, the water from all of which, if ordinary conditions prevailed, would be forced to flow down the narrow part of the valley in which the plaintiff's land is situated. The bed of the creek is composed of gravelly material, easily permeated by water. The excavation commences in the bed of the stream, and about at the level thereof, and for a distance of about four hundred feet it runs almost parallel with the stream at a distance of not more than fifty feet away, and at an elevation, at the upper end of the four hundred feet, about two feet below the bottom of the stream bed. The tunnel extends from the upper extremity of this excavation, deflecting somewhat from the course of the stream, and runs under the ground four

hundred and eighty feet, to a point about three hundred feet from the bed of the stream, and some four feet below the bottom of the bed. The bottom of the tunnel and excavation throughout its course consists of the same gravelly material as the bed of the stream. The evidence shows that, in the fall of 1898, when the tunnel was begun, there was a small surface stream of water flowing in the bed of the creek; that when it was completed early in the following spring, and even before its completion, the stream had ceased to flow, a thing which had never before occurred at that season; and that from that time until the trial, in the fall of 1899, there had been no water flowing in the creek at that point. From these facts the conclusion is almost irresistible that the excavation and the tunnel had either intercepted some of the water that would eventually have reached the stream, or had withdrawn some of the water from the stream by percolation through the gravelly material. The streams of this state in their course through the lower levels, after they have left the precipitous sides of the mountains on which they originate, do not ordinarily flow over beds of rock or other material impervious to water. The usual condition is, that such streams flow in a shallow channel, over and through a mass of sand and gravel saturated with water from bed-rock up to or slightly above the level of the surface of the stream. Streams of this character were the subject of the litigation, and the rules to ascertain what is necessary to make the underground water constitute a part of a stream were considered, in the cases of *Hale v. McLea*, 53 Cal. 578; *Los Angeles v. Pomeroy*, 124 Cal. 597; *Vineland Dist. v. Azusa Dist.*, 126 Cal. 486; and *Yarwood v. West L. A. W. Co.*, 132 Cal. 204. In almost every case a stream of this character, if excavations are allowed to be made in the permeable material underlying and adjoining the bed of the stream, the result inevitably is, that the water collected in such excavations either comes from the stream by percolation from above, or is intercepted on its way to the stream below, with the consequence that in either event the stream is diminished by the amount of water which is gathered in the excavation.

It is not necessary, however, in this case to determine whether or not the court was wrong in refusing to characterize the flow of underground water, which the plaintiff took

by means of his tunnel, as a part of the stream and necessary to its support and maintenance. The case of *Katz v. Walkinshaw*, ante, p. 116, decided November 28, 1903, establishes a rule with respect to waters percolating in the soil, which make it to a large extent immaterial whether the waters in this land were or were not a part of an underground stream, provided the fact be established that their extraction from the ground diminished to that extent, or to some substantial extent, the waters flowing in the stream. By the principles laid down in that case it is not lawful for one owning land bordering upon or adjacent to a stream, to make an excavation in his land in order to intercept and obtain the percolating water, and apply such water to any use other than its reasonable use upon the land from which it is taken, if he thereby diminishes the stream and causes damage to parties having rights in the water there flowing. If, therefore, it appears in this case that the finding of the court that the water taken by the plaintiff did not diminish the waters in the stream is not supported by the evidence, but that, on the contrary, the evidence shows that the stream was substantially diminished thereby, to the injury of the defendants, as the finding is necessary to support the judgment, the case must be reversed and a new trial had, even if the water when taken did not constitute strictly a part of the stream.

The court below manifestly did not consider that this question was of any consequence, and, having concluded that the water was not a part of the stream, it conceived the idea that it was not water to which the defendants were entitled in law, and that, consequently, its abstraction did not take any of the flow of the stream to which the defendants were entitled. And this would have been correct if the principle had not been established in *Katz v. Walkinshaw*, ante, p. 116, as stated. It is quite clear from the evidence that the court erred in finding that the stream was not diminished by the abstraction of the water by the plaintiff by means of the excavation and tunnel. Three hydraulic engineers testified on behalf of defendants, and each, after describing the condition and character of the material composing the bed of the creek and the bottom of the tunnel, stated that, in his opinion, necessarily, whatever water was taken from the excavation and tunnel diminished by that much the amount flowing in

the stream below. There was no evidence to the contrary. One engineer was examined on behalf of the plaintiff in rebuttal, but he was not asked whether or not, in his opinion, the percolating waters gathered by the tunnel would eventually reach the stream, nor whether or not the waters in the tunnel came from the stream through the permeable material. There is no conflict in the direct evidence on this question, and the circumstances, generally, tend to confirm the opinion of the engineers. The court should have found from the evidence that there was a diminution of the stream caused by the taking out of the water through the excavation and tunnel. Having found this fact, it would then be the duty of the court to ascertain and state the amount of the diminution. The plaintiff has no right to a decree declaring him to be the absolute owner of water thus taken from the creek, or quieting his title thereto. His rights therein are no greater than they would be if he had taken the water directly from the stream.

There is no finding upon the allegation that the plaintiff was taking this water to distant and non-riparian lands. The court below probably deemed this immaterial, after having found that the water taken was no part of the waters of the creek, and did not reduce the quantity there flowing. The evidence shows clearly that the water in question was taken beyond the boundaries of the land described in the complaint, but it does not show to what use it was put by the plaintiff. He had no right, however, to take it beyond the lines of the land from which it was taken and divert it from the stream, either to let it go to waste or to use it on other lands. The motion for a new trial should have been granted.

The order appealed from is reversed and the cause remanded for a new trial.

Van Dyke, J., and Angellotti, J., concurred.

Hearing in Bank denied.

[L. A. No. 1101. Department One.—December 10, 1903.]

SOUTHERN CALIFORNIA MOUNTAIN WATER COMPANY, Respondent, v. GEORGE W. CAMERON et al., Appellants.

ACTION TO CONDEMN LAND—DISMISSAL BY PLAINTIFF—STIPULATION—CONDITIONS RENDERED IMPOSSIBLE.—The right of the plaintiff in an action to condemn real property to dismiss it before trial, upon payment of costs, where no counterclaim had been made nor affirmative relief sought by cross-complaint, or answer, is not precluded by a stipulation for judgment for the plaintiff at a fixed price, containing conditions for its effectiveness which have never occurred and cannot occur.

APPEAL from a judgment of the Superior Court of San Diego County dismissing an action at plaintiff's request. N. H. Conklin, Judge.

The facts are stated in the opinion.

W. R. Andrews, and W. T. McNealy, for Appellants.

The stipulation precluded the idea of a trial. (*Gregory v. Smith*, 102 Cal. 50; *Cooper v. Gordon*, 125 Cal. 296.) The stipulation fixed the rights of the parties, and the plaintiff had no right to dismiss not given by the terms of the stipulation. (Code Civ. Proc., sec. 581; *Killey v. Wilson*, 33 Cal. 692, 693; *Clark v. Hundley*, 65 Cal. 95; *Robinson v. Placer-ville etc. R. R. Co.*, 65 Cal. 266; *Casey v. Jordan*, 68 Cal. 246; *Wyatt v. Sweet*, 48 Mich. 539; *Hutchings v. Page*, 67 Wis. 207.) Where the plaintiff, by his own default, has been disabled from making the stipulation effective, by compliance with the conditions, he cannot take advantage of his own wrong. (Broom's Legal Maxims, 4th ed., pp. 212, 216, 275, 281.)

Titus & Shaw, for Respondent.

The plaintiff had the right to dismiss the action when the stipulation did not preclude it by its terms. (Code Civ. Proc., secs. 581 (subd. 1), 1256.) In condemnation proceedings the plaintiff may dismiss before judgment, even after

the price is fixed, before it is paid. (*United States v. Oregon Ry. and Nav. Co.*, 16 Fed. 524; *State v. Heig*, 44 Mo. 116; *Maybon v. Halsted*, 39 N. J. L. 600; *O'Neil v. Hudson County*, 41 N. J. L. 61; *People v. Brooklyn*, 1 Wend. 318;¹ *Fox v. Western Pacific R. R. Co.*, 31 Cal. 538; *Lamb v. Schottler*, 54 Cal. 319; *Chicago v. Barbain*, 80 Ill. 482; *City of Bloomington v. Miller*, 84 Ill. 621; *Blackshire v. Atchison etc. R. R. Co.*, 13 Kan. 514.)

COOPER, C.—This action was brought to condemn certain real estate alleged to be the property of defendants Cameron. In February, 1901, on plaintiff's motion, the court made an order dismissing the action, and judgment of dismissal was accordingly entered. This appeal is from the judgment. Plaintiff had the right under the statute to dismiss the case at any time before trial, upon payment of costs, provided a counterclaim had not been made, nor affirmative relief sought by the cross-complaint or answer. (Code Civ. Proc., sec. 581, subd. 1.) No counterclaim had been made and no affirmative relief was sought by cross-complaint or answer. The plaintiff paid the costs. The above propositions are not disputed, but defendants claim that the plaintiff should not have been permitted to dismiss by reason of a stipulation. On the fourteenth day of May, 1897, the case stood upon defendants' demurrer to the plaintiff's amended complaint, which demurrer was filed in November, 1895, and appears never to have been disposed of in any manner. On said fourteenth day of May the parties entered into and filed a stipulation as to the value of the land the number of acres in the respective tracts sought to be condemned. The stipulation provided that judgment should be entered for plaintiff, as prayed, the value of the land to be fixed as per the stipulation; provided, that no judgment should be entered and no further proceedings had until a final decision of the supreme court in a case then pending therein (referring to the cases of *Meyer v. City of San Diego*, and *San Diego Water Co. v. City of San Diego*, consolidated, 62 Pac. 211). Said stipulation further provided: "And if judgment be rendered in said supreme court in said action, whereby it shall appear from

the decision of said supreme court that the bonded indebtedness referred to in the judgment of the superior court of San Diego County hereinbefore rendered in said action is, and will be, valid and binding upon said city, and that the bonds which may be issued pursuant thereto will be legal, valid, and binding obligations upon said city, then judgment shall be rendered in this action for the condemnation of said lands described in plaintiff's amended complaint herein, at the valuation hereinbefore fixed and referred to, and the value of said lands, as above stated, shall be forthwith paid to the defendants, respectively, according to their ownership, and if it should finally be decided by said supreme court that said bonds are invalid, then the plaintiff shall have the option to have said judgment entered at the valuation aforesaid, or to dismiss said action.

"It is further stipulated that if the plaintiff herein does not use due diligence in bringing said case now pending in the supreme court, and above referred to, to a hearing before said court, that the defendants, or either of them, at any time upon due notice given to the plaintiff, may have this action dismissed."

The case referred to in the stipulation was afterwards tried in the superior court of Orange County, and judgment entered against defendants in said action, adjudging the contract void, and that the city of San Diego and its officers be perpetually enjoined from carrying out their contract or issuing any bonds, and that the attempted bonded indebtedness of the city of San Diego was void. An appeal was taken from the judgment by the city of San Diego and by this plaintiff, which appeal was dismissed in the supreme court as to this plaintiff, because plaintiff had not executed the proper undertaking on appeal. The appeal was afterwards dismissed in the supreme court as to the city of San Diego, by motion of its own attorney. It thus appears that the bonded indebtedness of the city of San Diego, referred to in the stipulation has never been decided to be valid and binding, nor has it been decided that any bonds which might be issued will be legal or valid. On the contrary, just the opposite has been held, and the judgment of the superior court of Orange County has become final by reason of the

dismissal of the appeals. It is therefore apparent that the conditions mentioned in the said stipulation as to the right to have judgment entered in this case have never occurred. It is also evident that such conditions cannot now occur. This is the view taken by appellants' counsel, for in their brief they say: "The decision provided for in the second paragraph of the stipulation never having been rendered, and, on account of the termination of the cases therein referred to, it being impossible now that any decision of the supreme court can be rendered in said cases, we claim that this paragraph of the stipulation becomes nugatory." The right to have judgment entered on the merits depends upon the stipulation. We look in vain for any provision in the stipulation authorizing judgment to be entered in the present condition of affairs. We do not deem it material here to inquire into the question as to how the present condition of the cases referred to in the stipulation was brought about. We are confined, as to the judgment, to the rights of the parties as measured by the stipulation. If the stipulation was intended to be a sale of the defendants' land to the plaintiff, such intention nowhere appears. On the contrary, it is provided that if it shall be finally decided by the supreme court that said bonds are invalid, "then the plaintiff shall have the option to have said judgment entered at the valuation aforesaid, or to dismiss said action." While the supreme court has not decided that the bonds are invalid, the effect of the appeal being dismissed is to make the decision of the lower court holding them invalid final. The plaintiff, therefore, has the right to dismiss the action, as the stipulation does not now prevent it. Defendants took the precaution to provide that if plaintiff did not use due diligence in prosecuting the case referred to in the stipulation, that, as a penalty, defendants might have the action dismissed. This seems to have been the view taken by defendants' attorney prior to the time plaintiff gave notice of motion to dismiss; for in a letter to plaintiff's attorney, dated May 12, 1899, he quoted the provision of the stipulation as to defendants' right to dismiss for want of diligence, and said: "Consequently said company is no longer in a position to carry out its agreement, as provided for in said stipulation, to use due diligence in the prosecution of said action of *Meyer v. City of San Diego* to a

final determination. Such being the case, it seems to me we are entitled to take action as provided in said stipulation." If the stipulation were a valid contract, upon consideration, for the sale of defendants' land to plaintiff, it might be enforced, or damages given in the proper court, but even then it would not prevent plaintiff from dismissing its action for condemnation of the lands. The result of the stipulation was to bind defendants for a certain time as to the price of the land sought to be condemned, and the withdrawal of any question as to the right of plaintiff to condemn. They took chances on getting the price per acre for the land as valued in the stipulation. They did not take the precaution to make the stipulation more certain and definite. As they did not do so, the court cannot aid them by adding to it matters not provided for. Defendants still have their land, freed from the stipulation and from the suit pending to condemn. The result seems to be that which was anticipated by inserting the clause as a protection to defendants in the latter part of the stipulation. Defendants were given the right, in case due diligence was not used, to have the action dismissed. Whether plaintiff used due diligence or not, it has dismissed the action. If it be true that plaintiff intends to bring another action to condemn the same lands for the same purpose, it is also true that the defendants have the right to contest the proceedings and protect their property. If they should again enter into a stipulation, it is presumed that they will use due care to protect their rights by the stipulation.

It appears that plaintiff made a prior motion to dismiss this action, which motion was denied without prejudice. The plaintiff appealed from the said prior order denying its motion to dismiss. The decision herein makes it unnecessary to review the action of the court in regard to the prior motion.

The order should be affirmed.

Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment of dismissal appealed from is affirmed and plaintiff's appeal from the prior order is dismissed.

Shaw, J., Angellotti, J., Van Dyke, J.

A rehearing in Bank was denied January 9, 1904. Beatty, C. J., then delivered the following dissenting opinion:—

BEATTY, C. J.—I dissent from the order denying a rehearing. The order of the superior court cannot be affirmed without deciding one or the other of two propositions against the appellants, and neither of them has been decided or discussed in the Department opinion. Appellants contend: 1. That if the cause referred to in the stipulation had been decided by the supreme court on the merits, affirming the validity of the bonds of San Diego, the plaintiff could not then have dismissed the action, but would have been bound to enter the judgment as stipulated; and 2. That being so bound in the contingency stated, the plaintiff became absolutely bound when solely through its default in prosecuting the appeal referred to the condition of its obligation became impossible of fulfillment. These contentions may or may not be sound, but the order cannot be affirmed without deciding at least one of them in the negative.

[Sac. No. 987. Department Two.—December 10, 1903.]

P. F. WALTHER, Respondent, v. SIERRA RAILWAY COMPANY et al., Appellants.

ACTION BY TENANT—KILLING OF DOMESTIC ANIMAL—FAILURE OF RAILROAD COMPANY TO FENCE TRACK—CONSTRUCTION OF CODE.—A tenant has a property right in the land occupied by him within the meaning of section 485 of the Civil Code, giving a right of action against a railroad company for the killing of a domestic animal "upon their line of road which passes through or along the property of the owner thereof," in case of the company's failure to fence the track. Any lawful occupant of the land may maintain the action in case of such failure.

APPEAL from a judgment of the Superior Court of Stanislaus County. William O. Minor, Judge.

The facts are stated in the opinion of the court.

S. D. Woods, L. J. Maddux, and R. L. Beardslee, for Appellants.

C. W. Eastin, for Respondent.

HENSHAW, J.—This action was prosecuted against defendants under section 485 of the Civil Code, to recover damages for the killing of a mule. The plaintiff was the lessee of the owner of the land. He was awarded a judgment, from which defendants appeal. The single proposition which they here advance is, that the section above cited gives a right of action only to the "owner" of the land along or through which the railroad passes, to the exclusion of tenants and lessees.

In support of their contention appellants quote *Baker v. Southern California Ry. Co.*, 110 Cal. 455, where it is said: "It will be noticed that by this section it is contemplated that the plaintiff must be the owner of the land through which the line of road passes." But herein the court was considering the sufficiency of the complaint filed in the justice's court, which pleaded ownership, and the question as to what would constitute a sufficient ownership under the statute was not before it. This becomes apparent from the fact that the learned author of the opinion in *Baker v. Southern California Ry. Co.* also spoke for the court in the case of *King v. Southern Pacific Co.*, 109 Cal. 96, where, discussing the case of *McCoy v. Southern Pacific Co.*, 94 Cal. 568, involving the same section of the Civil Code, he said: "The status of plaintiff was held to be that of a mere licensee of the Boyd brothers, they being at all times in the actual possession of the land, and, for the purposes of the statute heretofore referred to, the owners thereof." The Boyd brothers were but the tenants of the owner. Again, appellants rely upon the language of this court in the same case upon another appeal, reported in 126 Cal. 516, where it is said, still referring to this section of the Civil Code: "The whole provision seems to be in the interest of the owner of the land through or along which the railroad runs." But that decision further declared that, even if the section was broad enough in its scope to include a tenant or licensee, there was an utter failure of evidence to show that the plaintiffs were such tenants or

licensees. If it be held that the opinion is a determination that the provisions of the section limit the right of action to the owner of the land alone, then it must be noted that upon this particular point there was no decision of the court. It was a Department opinion, signed by but two members, and in the concurring opinion of the chief justice it is said: "As to the right of a lessee to maintain an action under the statute, I have no doubt that his estate is sufficient for the purpose, though he would be bound, no doubt, by any waiver on the part of his landlord of the right to have the land fenced."

We entertain no doubt that the last-quoted sentence expresses the true construction of the section, and this construction is not only borne out by our own decisions, but is in harmony with the cases arising under like statutes in sister states. In the first place, it is to be observed that the section itself does not limit the right of action to the owner of the land. Its language is, that the railroad company is responsible for the injury it may occasion to domestic animals upon its line of road which passes through or along the *property* of the owner of the animals. The only word here requiring definition is the word italicized, and the question is what is the property in land which a man must possess to vest him with this right of action. In *McCoy v. Southern Pacific Co.*, 94 Cal. 568, the action was brought, not by the owner, nor yet by the tenant of the owner, but by the licensee of the tenant, who had acquired from the tenant the right to pasture the land. The Boyd brothers were the tenants. Throughout the case it is assumed that the rights of the Boyd brothers were absolute under the statute, and the determination of this court was merely that their licensee occupied no more favorable position than would the tenants. This was a decision by the court in Bank, and in his concurring opinion Mr. Justice McFarland says distinctly and in terms: "The Boyds were the owners of the property within the meaning of the statute."

That a tenant has a property in land may not be doubted. The word as here used is interchangeable with estate. Immediately upon the commencement of the term, unless special reservation is made, the tenant succeeds to all the rights of the landlord that are annexed to the estate, so far as the posses-

sion and enjoyment of the premises are concerned, and he may sue either the landlord or a stranger for any species of injury thereto that affects his estate. (Wood on Landlord and Tenant, p. 1300.) Elsewhere, as has been said, the decisions are uniform to the effect that the lawful occupant of the land may maintain this action, and, indeed, many of the cases go further, and upon the theory that the requirement to fence is an exercise of the police power for the benefit of the public generally, it is held that this action is open to any person suffering injury from the fault of the railroad company in this regard. (*Norris v. Androscoggin R. R. Co.*, 39 Me. 273;¹ *Marietta etc. R. R. Co. v. Stephenson*, 24 Ohio St. 48; *Sika v. Chicago etc. Ry. Co.*, 21 Wis. 370; *Great Western R. R. Co. v. Helm*, 27 Ill. 198;² *Sawyer v. Vermont etc. R. R. Co.*, 105 Mass. 196; *Dawson v. Midland Ry. Co.*, 8 L. R. Ex. 8; *Spinner v. New York Cent. etc. R. R. Co.*, 67 N. Y. 153; Rorer on Railroads, p. 1407; 1 Redfield's American Railway Cases, p. 355.)

A motion by respondent to dismiss this appeal has been submitted. It has been deemed advisable, however, to decide the case upon the merits, and under the conclusion which we have reached a decision upon the motion to dismiss becomes unnecessary.

The judgment appealed from is affirmed.

McFarland, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[Sac. No. 964. In Bank.—December 10, 1903.]

JOHN F. CALLAHAN, Respondent, v. JOHN P. JAMES
et al., Appellants.

MINING CLAIMS—EFFECT OF TOWNSITE ENTRY AND PATENT.—A townsite entry and patent does not carry title to any mine of gold, silver, cinnabar or copper known to be valuable for mining purposes at the date of the entry, or to any valid mining claim or possession then held under existing laws. In respect to a valid mining claim

¹ 63 Am. Dec. 621.

² 81 Am. Dec. 226.

or possession it is immaterial whether the claim was then known to contain mineral of sufficient value to justify exploration or not.

ID.—ASSESSMENT WORK—FORFEITURE—BURDEN OF PROOF.—When there has been a valid location of a mining claim, and possession has been maintained thereunder, the burden of proving the facts constituting a forfeiture of the title or right of possession by failure to do the annual assessment work required is upon the party asserting it.

ID.—ACTION TO QUIET TITLE—FAILURE TO FIND UPON DEFENSE OF FORFEITURE—EVIDENCE IN STATEMENT.—In an action by the owner of a mining claim to quiet his title thereto against defendants claiming under a townsite entry and patent, where the evidence in the statement is sufficient to justify a finding that the annual work was done by the mining claimants, and there is no evidence to sustain the defense of forfeiture, the failure to find upon such defense will not justify a reversal.

ID.—EVIDENCE—IDENTIFICATION OF CLAIM—CONTINUANCE OF VEIN IN ADJOINING CLAIM.—Evidence was admissible to show that the same vein ran through plaintiff's mining claim and a mine belonging to other claimants, which was shown to adjoin plaintiff's mine, as tending to identify the plaintiff's mining claim and its location on the ground.

APPEAL from a judgment of the Superior Court of Tulumne County and from an order denying a new trial. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

F. W. Street, for Appellants.

J. B. Curtin, for Respondent.

SHAW, J.—This is an action by the plaintiff for a decree determining the title to a certain mining claim situated in the town of Groveland, and known as the Rhode Island Mining Claim. Judgment in the court below was given for the plaintiff; the defendants' motion for a new trial was denied, and from the judgment and order the defendants appeal.

The plaintiff claims title to the mining claim under a mining location originally made in the year 1854, by one Reid, and relocated by Reid and one Austin January 1, 1876. The plaintiff obtained a conveyance of the mine from Reid and the successor of Austin in 1896. The defendant James de-rains his title from the patent issued for the townsite of

Groveland under the federal laws (U. S. Rev. Stats., secs. 2387, et seq.), and a deed from the patentee of the townsite to Laurence Murray, dated September 5, 1879, purporting to convey to Murray lot 8 of block 6, as designated on the official map of the townsite, of which lot the mining claim is a part. The date of the original entry of the townsite was October 3, 1877, and the patent was issued February 10, 1886. It appears from the findings that the mining location was duly made on January 1, 1876, by Reid and Austin, and that their title became vested in the plaintiff March 26, 1896.

1. The appellants claim that the decision is against law, because there is no finding that at the time of the entry of the townsite in 1877, or at any time thereafter, the land embraced in the mining claim was known to contain minerals of such extent and value as to justify expenditure for the purpose of extracting them, citing in support of the proposition that this is necessary *Richards v. Dower*, 81 Cal. 44; *Smith v. Hill*, 89 Cal. 122; *Lindley on Mines*, sec. 176; and a number of decisions of the United States supreme court. These decisions, however, are not applicable to the case as shown by the findings. At the time of the entry of the townsite, in 1877, section 2329 of the U. S. Revised Statutes (U. S. Comp. Stats. 1901, p. 1549) relative to townsite entries provided that "no title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws." It will be observed that this section prevents the townsite entry from carrying title to two classes of mining claims. The first class need not be characterized by possession in any person. It is sufficient if in fact the property is a known mine of gold, silver, cinnabar, or copper. It is to this class of mining claims that the decisions above cited refer. They are in effect that it is not sufficient that there be in fact a mine of gold, silver, cinnabar, or copper, unless at the time of the townsite entry it is known to be such. The other class of mining claims referred to in this section consists of any valid mining claim or possession held under existing laws. The claim under consideration in this case belongs to this class. The court finds that Reid took exclusive possession of the mining claim in the year 1854, and discovered valuable gold-bearing quartz-rock in place thereon

in sufficient quantities to justify exploration and development, and did thereafter continue to hold, work, operate, and develop the said mining claim in the manner required by law until he conveyed the same to the plaintiff, in 1896. It therefore appears that at the time of the townsite entry, and at all times since, the claim in question was a valid mining claim and possession held under existing laws. In this class of cases it is immaterial whether the claim was known to contain minerals of sufficient value to justify exploration or not.

There is no finding that since the relocation in 1876 the claim has been kept alive by doing the assessment-work required. This omission, however, cannot affect the case. The statement on motion for new trial shows that there was no evidence given which would justify a finding that there had been a failure to do the assessment-work. Where there has been a valid location of a mining claim, and possession has been maintained thereunder, the fact of a failure to do the assessment-work necessary to hold the same is a matter of defense. It constitutes in law a forfeiture of the title, or right of possession, and, as is the rule generally in respect to forfeitures, the burden of proving the facts which constitute it rests upon the party asserting it. (*Emerson v. McWhirter*, 133 Cal. 515; *Harris v. Kellogg*, 117 Cal. 489; *Quigley v. Gillett*, 101 Cal. 462; *Hammer v. Garfield etc. Co.*, 130 U. S. 291.) The failure to find upon the facts in issue constituting a defense to an action will not justify a reversal, unless it is shown that there was evidence given from which such facts could be found. (*Himmelman v. Henry*, 84 Cal. 104; *Wise v. Burton*, 73 Cal. 175; *Winslow v. Gohransen*, 88 Cal. 450; *Giletti v. Saracco*, 110 Cal. 428; *Klokke v. Escailier*, 124 Cal. 297; *Stewart v. Hollingsworth*, 129 Cal. 180.) As a matter of fact, the statement here shows that there was abundant evidence from which the court might have found that the assessment-work had been regularly done from year to year from the first location of the mine until the time of beginning this action, and none to the contrary. So much the more, therefore, would the rule apply that the failure to find this fact would not invalidate the judgment.

2. It is claimed by the appellant that the finding that valuable gold-bearing rock had been discovered upon the mine

prior to the application for the townsite patent is not sustained by the evidence. We have examined the record and find that there is sufficient evidence on the subject to sustain the finding to that effect.

3. The court did not err in overruling the objection to the question put to one of the plaintiff's witnesses whether or not the same vein that ran through the Rhode Island Mine also ran through the Mount Jefferson Mine. It was in evidence that the two mines joined, and the fact that the same vein ran through both mines was of some assistance in identifying the mining claim and its location on the ground.

We do not consider it necessary to mention other and minor points contained in the brief. They would not be of sufficient importance to justify a reversal of the case, even if it was conceded that the court erred therein.

The judgment is affirmed.

Angellotti, J., Van Dyke, J., McFarland, J., and Lorigan, J., concurred.

[L. A. Nos. 1121, 1090. Department One.—December 10, 1903.]

PARKE W. KAUFFMAN et al., Members of San Buena Ventura Lodge, F. and A. M., Appellants and Respondents, v. JACOB K. GRIES, Respondent and Appellant.

ESTATES OF DECEASED PERSONS—CONSTRUCTION OF WILL—CARE OF BURIAL LOT BY MASONIC LODGE—DEVISE TO HUSBAND—PRECATORY WORDS—TRUST.—Where a wife devised land to her husband in fee simple, with an expression of "desire" and "request" that he should convey it to a Masonic lodge, "in such manner and at such times as he may deem best," and that he should out of the rents, issues, and profits of other land devised to him for life invest the sum of one thousand dollars in some satisfactory security and transfer the same to the said lodge, and that such conveyance and transfer should be made in such manner as to impose the obligation upon the lodge to care for her burial lot; and where the will also provided that, in case of the death of her husband before her own death, the land devised to her husband "in fee simple, with the re-

quest that it be conveyed to the Ventura Lodge," was devised to her executors in trust for the same purpose,—the trust so created, taken in connection with the devise to the husband, indicates that the precatory words accompanying the devise to him were not intended to import a trust or charge upon the land in his hands, such as could be enforced in a court of equity.

ID.—DECREE OF DISTRIBUTION—ERRONEOUS JUDGMENT.—There is no warrant in the will for a judgment in favor of the lodge for one thousand dollars against the husband of the testatrix; and where the decree of distribution of her estate distributed the land to the husband, without imposing any charge thereon, and also distributed one thousand dollars to the lodge, under the conditions contemplated by the will, the rights of the lodge are limited by such decree; and a judgment for said sum in favor of its members against the husband must be reversed.

APPEAL from part of a judgment of the Superior Court of Ventura County and from an order denying a new trial, and cross-appeal from another part of said judgment. W. S. Day, Judge, presiding.

The facts are stated in the opinion.

Blackstock & Ewing, and Toland & Andrews, for members of Ventura Lodge.

The will created a trust chargeable against the husband in equity, to which the decree of distribution is no bar. (*Colton v. Colton*, 127 U. S. 300-322; *Griffith v. Godey*, 113 U. S. 89; *Olivas v. Olivas*, 61 Cal. 382; *Curtis v. Schell*, 129 Cal. 208;¹ *Golson v. Dunlop*, 73 Cal. 157; *Guerrero v. Ballerino*, 48 Cal. 119; *Sohler v. Sohler*, 135 Cal. 331; *Aldrich v. Barton*, 138 Cal. 220;² *Silva v. Santos*, 138 Cal. 536.)

Barnes & Selby, for Jacob K. Gries.

The decree of distribution is conclusive of the rights of the parties. (*Goad v. Montgomery*, 119 Cal. 552, 553;³ *Matter of Trust of Trescony*, 119 Cal. 568; *William Hill Co. v. Lawler*, 116 Cal. 359; *Jewell v. Pierce*, 120 Cal. 79; *McKensie v. Budd*, 125 Cal. 600; *Toland v. Earl*, 129 Cal. 148, 152.⁴) The trust, if created, was for a perpetuity, and void. (*Bates*

¹ 79 Am. St. Rep. 107.

² 63 Am. St. Rep. 145.

³ 94 Am. St. Rep. 48, and note.

⁴ 79 Am. St. Rep. 100.

v. *Bates*, 134 Mass. 110;¹ note to *Rhymers' Appeal*, 39 Am. Rep. 789.) The precatory words did not create a trust or charge in equity in this case. (2 Pomeroy's Equity Jurisprudence, sec. 1014; *Knight v. Knight*, 8 Beav. 148; *Orth v. Orth*, 145 Ind. 184.²)

GRAY, C.—This suit was brought by and on behalf of the members of San Buena Ventura Lodge, No. 214, Free and Accepted Masons, to compel the defendant to comply with the terms of the last will and testament of his deceased wife, and to convey to said lodge certain real estate and one thousand dollars in money, in accordance with the terms of said will. The judgment was in defendant's favor as to the real estate, and plaintiff's favor as to the thousand dollars. Both parties appeal. The plaintiffs' appeal is taken from the portion of the judgment against them, and from an order denying them a new trial, and the defendant's appeal is taken from that portion of the judgment relating to the thousand dollars.

We will dispose of both appeals in one opinion, first considering the appeal of the plaintiffs.

The plaintiffs predicate their rights to the real estate in controversy upon the theory that the will declares a trust in their favor in said real estate. The will, so far as necessary to be quoted for the purpose of both appeals, is as follows:—

“First, I direct that after my death my remains shall be buried in my burial lot in the Springfield Cemetery in Ventura County, state of California, where are buried my father, mother and children. . . .

“I also give and bequeath and devise to my said husband all that portion of my real property in Ventura County, California, lying on the east side of the Saviers road, and north of the row of gum-trees and more particularly described as follows, to wit: . . . containing 99.58 acres, as shown upon map of my real property made by George C. Power in June, 1895.

“It is my desire and I hereby request my said husband to convey in such manner and at such times as he may deem best, under contract or otherwise, the said above-described 99.58

¹ 45 Am. Rep. 305.

² 57 Am. St. Rep. 185, 203, and note.

acres of land to Ventura Lodge, No. 214, A. F. & A. M., of the town of San Buena Ventura, California, or to trustees for its use and benefit in such manner as to impose upon said lodge or the trustees thereof the obligation to properly care for, protect, and maintain in good order the cemetery lot in said Springfield Cemetery in which I may be buried. All the rest, residue, and remainder of the real estate of which I may die possessed wheresoever situate, I hereby give, bequeath, and devise to my said husband, Jacob K. Gries, for life, with remainder over to the persons herein below named, giving to my said husband for the term of his natural life the use, possession, rents, issues, and profits of all the said land with remainder over as follows, to wit:—

“Out of the rents, issues, and profits of the land hereinbefore devised to my said husband for life, I request him to invest the sum of one thousand dollars in some satisfactory security and transfer the same to the Ventura Lodge, No. 214, A. F. & A. M., of San Buena Ventura, California, under a contract with said lodge that so much of the income or principal as may be necessary shall be used by said lodge for the proper care, repair, and maintenance of the burial lot in Springfield Cemetery in which my remains shall be interred.

“And all of the rest, residue, and remainder of the estate of which I may die possessed, of whatsoever kind or nature, or wheresoever situate, I give, bequeath, and devise to my well-beloved husband, Jacob K. Gries, making him my residuary legatee herein.”

The will goes on to provide that in case of the death of her husband before her own death, all that portion of her real estate “herein specifically devised to my husband in fee simple with the request that it be conveyed to the Ventura Lodge,” is devised to the executors of her will “in trust, however, for the following purposes, to wit: “As soon after my decease as practicable, the said executors as such trustees shall convey said real property to said lodge under a contract from said lodge to carry out my wishes as hereinbefore expressed regarding the care of my burial lot in said Springfield Cemetery; and in the event that such contract cannot be legally made, then the said executors as such trustees shall have full power of sale and disposition of said real

estate are hereby directed to sell the same, and the proceeds arising from the sale of said real estate shall be used by my executors as such trustees for the same purpose as said real estate was intended to be used as hereinbefore expressed."

We are of the opinion that it was the firm desire of the maker of this will that her burial lot should be kept in repair. But we are equally well satisfied that it was not her purpose to bind her husband to that object in such a way that the trust and confidence which she reposed in him could be enforced in a court of equity. If she outlived her husband, it was her purpose to charge upon her executors and her estate an enforceable trust for the care of her burial lot. This is plain from the language used in that connection. To her executors the devise was "in trust, however, for the following purposes," etc. To her husband the devise is referred to by her as "all that portion of my real estate herein specifically devised to my said husband in fee simple with the request," etc. She did not mean the same thing in both these expressions. (*Williams v. Williams*, 2 L. R. Ch. Div. 12.) In the one instance she determined that her grave should be cared for as a matter of business; in the other she wanted all this to be left (with a mere suggestion) to those sentiments which usually remain with the survivor of a happy matrimonial union. She doubtless thought that in the case of her husband surviving her she would take the chances of a neglected grave rather than attempt to bind him by the language of her will to do that which she would naturally regard as his duty without being so bound.

"The cardinal rule for the construction of all wills is to ascertain the intention of the testator; and this intention is to be ascertained from the words of his will, taking into view when necessary or appropriate the circumstances under which it was made." (*Estate of Marti*, 132 Cal. 666; Civ. Code, sec. 1318.)

It appears from the early decisions in England that any and every precatory word was laid hold of to create a trust, but the modern cases in that country and the better-considered cases in America have gone the other way, and the rule in California has been laid down that the ordinary and natural import of the words used will be followed "unless a clear intention to use them in another sense can be col-

lected and that other can be ascertained." (*Estate of Marti*, 132 Cal. 666; Civ. Code, sec. 1324; *Shaw v. Lawless*, 5 Clark & F. 129; *Williams v. Williams*, 2 L. R. Ch. Div. 12; *Pen-nock's Estate*, 20 Pa. St. 268;¹ *Hess v. Singler*, 114 Mass. 56.) In Story's Equity Jurisprudence (vol. 2, sec. 1069), Judge Story says: "The doctrine of thus construing expressions of recommendation, confidence, hope, wish, and desire into positive peremptory commands is not a little difficult to be maintained upon sound principles of interpretation of the actual intention of a testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions and words of positive direction and command; and that in using the one and omitting the other he should not have a determinate end in view. It will be agreed on all sides that where the intention of the testator is to leave the whole subject as a pure matter of discretion to the good will and pleasure of the party enjoying his confidence and favor, and where his expressions of desire are intended as mere moral suggestions to excite and aid that discretion, but not absolutely to control or govern it, there the language cannot and ought not to be held to create a trust. Now, words of recommendation and other words precatory in their nature imply that very discretion as contradistinguished from peremptory orders, and therefore ought to be so construed unless a different sense is irresistibly forced upon them by the context. Accordingly, in more modern times a strong disposition has been indicated not to extend this doctrine of recommendatory trusts; but, as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear that they are designed to be used in a peremptory sense."

According to the ordinary use of the English language, the words "desire" and "request" do not import a trust or charge. (*Estate of Marti*, 132 Cal. 666.) And there is nothing in the rest of the will to indicate that they were used in any other than their ordinary sense; but, as we have already seen, there is an argument that they should be understood in their usual sense to be found in those portions of the will which contain apt language to create a trust that

¹ 59 Am. Dec. 718.

might be enforced in the courts. (*Williams v. Williams*, 2 L. R. Ch. Div. 12.)

The above and foregoing is, perhaps, only one of several reasons why the judgment of the lower court as to the real estate should be affirmed; but as it seems to be decisive of that branch of the case, even if we were to admit the correctness of plaintiffs' other contention, we deem it unnecessary to discuss the other points urged in the brief. We are of opinion that the precatory words of the will, interpreted by the light of all the rest of the will, do not constitute a trust that should be enforced in a court of equity. It may properly be remarked that the final decree of distribution in the matter of the estate of the deceased wife awarded the real property in dispute absolutely to defendant.

As to defendant's appeal from the part of the judgment to the effect that plaintiffs recover of and from him the sum of one thousand dollars, of course there is no warrant in the will or elsewhere for an unconditional money judgment like that. This will be readily understood from a reading of the portion of the will relating to the thousand dollars above quoted. There is nothing in the will even suggesting that the lodge shall have a thousand dollars in any way otherwise than under a contract that so much of the income and principal as may be necessary shall be used for the care, repair, and maintenance of the burial lot of deceased.

As appears from a decree of distribution entered in the superior court of Ventura County, in the matter of the estate of Mary Selina Gries, a copy of which is attached to the complaint as an exhibit, the thousand dollars referred to was ordered distributed to "Ventura Lodge, No. 214," etc., under the conditions and as provided in the will. And as this was a matter altogether within the jurisdiction of the court making that decree (*Toland v. Earl*, 129 Cal. 148¹), and the decree seems to give all that could be reasonably asked under the will in reference to this one thousand dollars, we think the lodge will have to content itself with what it was given in that decree.

We advise that the judgment, so far as it relates to the real estate and the order denying plaintiffs a new trial, be

affirmed, and that the money judgment for a thousand dollars and costs against defendant and in favor of plaintiffs be reversed.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment, so far as it relates to the real estate and the order denying plaintiffs a new trial, is affirmed, and the judgment for a thousand dollars and costs against defendant and in favor of plaintiffs is reversed.

Angellotti, J., Shaw, J., Van Dyke, J.

[Sac. No. 1007. Department Two.—December 11, 1903.]

JOHN K. ALEXANDER, Respondent, v. KATY ADAIR
WELCKER, Appellant.

MORTGAGE OF WIFE'S PROPERTY—JOINT EXECUTION WITH HUSBAND—
VERBAL INSTRUCTIONS TO HUSBAND—DELIVERY TO MORTGAGEES.—

Where a wife executed a mortgage of her property jointly with her husband, and delivered it to her husband to be delivered to the mortgagees, but with instructions to exact from the mortgagees a certain promise before delivery of it to them, and he delivered it to them without exacting such promise, or informing them of her instructions, the completeness of the delivery to the mortgagees was not affected by the wife's secret verbal instructions to her husband.

Id.—MORTGAGE FOR PURCHASE MONEY—PURCHASE OF LAND BY SON—
PART PAYMENT—ESTOPPEL.—Where the note and mortgage of the

wife's property were executed by the husband and wife in furtherance of a proposed purchase of land by their son from the mortgagees, who agreed to take the mortgage as part payment, upon delivery thereof by the husband as one of the mortgagors, the mortgagees were justified in closing the contract of purchase, and when they did so the wife is estopped from denying the delivery of the mortgage.

APPEAL from a judgment of the Superior Court of San
Joaquin County. Joseph H. Budd, Judge.

The facts are stated in the opinion of the court.

Adair Welcker, for Appellant.

D. E. Alexander, for Respondent.

McFARLAND, J.—This is an action to foreclose a mortgage. Judgment was for plaintiff against the defendant, Katy Adair Welcker, who appeals. The appeal is from the judgment, and is taken upon the judgment-roll alone; and no question can arise as to the sufficiency of the evidence to justify the findings.

The note and mortgage sued on were executed by appellant and William T. Welcker, then her husband, who, before the commencement of this action, died. The title to the mortgaged premises was in the appellant alone. After the mortgage had been duly signed and acknowledged by appellant and her husband, it was given by the husband to the mortgagees, Wilhoit and Devendorf. Appellant admits in her answer that she gave the note and mortgage to her husband to be delivered to the mortgagees; but she avers that she instructed him that before the delivery he should exact from them a promise to do certain things, and should not deliver them without such promise. The court finds that she exacted the said promise from her husband as to the delivery of the note and mortgage; but that "she intrusted the same to said William T. Welcker, and that he never at any time informed said Wilhoit and Devendorf, or either of them, of his said promise to said defendant, nor did he ever inform them, or either of them, concerning the exaction made by her of him aforesaid, and neither of them ever at any time had any notice or knowledge thereof, nor did they, or either of them, ever promise or agree," etc. Upon these facts appellant contends—and this is the main contention in the case—that there was no legal delivery of the mortgage to the mortgagees; but this contention cannot be maintained. She authorized her husband to deliver the mortgage, and the completeness of the delivery was not affected by any secret verbal instructions which she may have given him. The note and mortgage were given in furtherance of a proposed contract between a son of appellant and the mortgagees, by which the

former was to buy a certain tract of land from the latter, who had agreed to take the mortgage here sued on as part payment of the purchase money; and when the mortgage contemplated, duly signed and acknowledged, was delivered to them by one of the mortgagors, they had the clear right to take it and close the contract for the purchase of the land, as they did. Under the circumstances, the appellant is clearly estopped from denying the delivery of the mortgage.

There are no other points made by appellant which can be maintained or which need special notice.

The judgment appealed from is affirmed.

Lorigan, J., and Henshaw, J., concurred.

[Sac. No. 981. Department Two.—December 11, 1903.]

S. PROUTY, Appellant, v. ROBERT ADAMS et al., Respondents.

LANDLORD AND TENANT—NOTE FOR RENT—LITIGATED TITLE—INDEMNITY—CONSTRUCTION OF CONTRACT.—A contract of indemnity given by a landlord to his tenants contemporaneously with an absolute note given by them to him, payable on or before a fixed date, in a sum certain, agreeing "to fully indemnify them in the payment" of the note, which is described as given "in lieu of rent of a certain piece of ground containing one hundred acres more or less, and now in litigation," etc., is to be construed in connection with the note, which it is contemplated shall be paid according to its terms, and the indemnity is against loss to the tenants in case plaintiff should lose the title.

ID.—ACTION UPON NOTE—DEFENSE INCONSISTENT WITH CONTRACT.—In an action upon the note, no defense can be interposed which is inconsistent with the contract of indemnity, and a defense that the note was to be paid only on a contingency which had not arisen, such as that defendants would not be required to pay the note unless it was established in court that the plaintiff was the owner of the land, "and that it was not established," is not tenable.

ID.—PAROL EVIDENCE—UNCERTAIN CONTINGENCY—INDEMNITY AGAINST DOUBLE RENT—CONSISTENCY WITH CONTRACT.—The contract of indemnity being uncertain as to contingency, parol evidence is ad-

missible to show that it was intended to indemnify the tenants against loss arising from the payment of double rent, if the landlord's title should prove invalid, as such evidence is consistent with the terms of the contract; but parol evidence is not admissible to vary the written contract by showing that the note was not to be paid at all except upon the happening of a certain contingency.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. Joseph H. Budd, Judge.

The facts are stated in the opinion of the court.

B. C. Minor, for Appellant.

Prior to the payment of the note, the defendants can neither plead as a defense nor sue upon the contract of indemnity. (Civ. Code, sec. 2778, subd. 2; *Rogers v. Kimball*, 121 Cal. 254,—concurring opinion.) All oral negotiations were merged in the written contracts, and parol evidence is not admissible to vary them or add to their terms. (Civ. Code, sec. 1625; *Goldman v. Davis*, 23 Cal. 256; *Nicholson v. Tarpey*, 89 Cal. 620; *Harrison v. McCormick*, 89 Cal. 330.¹)

Avery C. White, for Respondents.

Parol evidence is admissible to show breach of a contract constituting the consideration of the note, and to show that the note was delivered to take effect upon a condition precedent, which has not taken place. (*Billings v. Everett*, 52 Cal. 661; *Jefferson v. Hewitt*, 103 Cal. 630; *Howard v. Stratton*, 64 Cal. 487; *Schultz v. Noble*, 77 Cal. 79; 1 Daniel on Negotiable Instruments, sec. 81, and cases cited.)

HENSHAW, J.—This action is upon a promissory note executed to plaintiff by defendants, in tenor and terms as follows:—

“Apr. 23d, '95.

“On or before October the first, nine-five, for value recd., we, or either of us, promise to pay to S. Prouty, or order three hundred and fifty dollars with interest at one per cent per month after due and in case suit is commenced to collect

¹ 23 Am. St. Rep. 469.

any part thereof we agree to pay reasonable amount for attorneys fees for collection."

Contemporaneously with the execution of this note plaintiff executed to defendants the following contract:—

"ELLIOTT, April 23d, '95.

"I hereby agree to fully indemnify Robert and H. Adams, in the payment of a certain promissory note, given to me for \$350.00 and even date, in lieu of rent of a certain piece of ground containing 100 acres, more or less, and now in litigation between Charles Quiggle and myself.

(Signed) "S. PROUTY."

In their answer defendants were permitted to set up as a defense the following matters: That they were the tenants of plaintiff in the occupancy of certain farming land; that while in such occupancy one Ray served notice upon them that he was the owner of the land, with a demand that all rents therefor be paid to him. Defendants immediately informed plaintiff of this notification and demand. Upon the day of the execution of these contracts plaintiff told the defendants that there was an action pending between himself, as plaintiff, and Ray and others, as defendants, that it would be to his (plaintiff's) advantage in the coming trial if the defendants, in lieu of rent, or the paying of rent, would give to him their promissory note, and that defendants would not be required to pay the note "unless it was established in said court that he, the plaintiff, Simon Prouty, was the owner of said land." Induced solely by these representations, the defendants executed the promissory note, and in return received the contract of indemnity hereinabove set forth. Defendants further allege that the action was tried and resulted in a judgment in favor of the defendants therein, and that plaintiff has not established in that court that he was the owner of the lands or any part thereof.

Over the objection of plaintiff, the court allowed this defense, and upon the trial found in accordance with its allegations, and judgment passed for defendants. The right of the defendants to urge such a defense is the principal question here argued.

The action upon the promissory note being by the payee against the makers, all legitimate defenses were available.

If the promissory note was the only written contract between the parties, it would unquestionably be the right of defendants to show lack of consideration, the true consideration, that the note was to be collected only upon a contingency that had not arisen, or any other like defense. But, with the written contract of indemnity in existence, the rights of the defendants in this regard are limited by that, and they cannot interpose any defense at variance with the terms of that instrument. Reading the promissory note with the contract of indemnity, it is beyond controversy that it was in the contemplation of the parties that the note was to be paid upon October 1, 1895. The note so states, and the contract of indemnity is an agreement to indemnify the makers "in the payment" of the note. They could not be indemnified in the payment unless payment were actually made. The defense here interposed was a defense which allowed them to show that their note was not to be paid at all, excepting upon a certain contingency; whereas their written contract plainly expressed the agreement that it should be paid when it became due, and that upon contingencies arising after the payment, the plaintiff would indemnify the defendants to the extent of the payment. In other words, by the terms of the written contracts, the defendants bound themselves to pay this promissory note when it became due. Plaintiff, in turn, bound himself, after such payment, to indemnify the defendants to the extent of the payment, if certain contingencies arose. As to what those contingencies were, the contract of indemnity being uncertain, resort might be had to parol evidence, but that is very different from a resort to parol evidence to show, in conflict with the very terms of the writing, that the note was not to be paid at all, except upon the happening of certain contingencies.

By the undisputed testimony, the defendants were tenants of plaintiff. They feared that they might be compelled to pay double rent in the event that Prouty's title to the land should prove invalid. Over this there is no dispute. The testimony of plaintiff from this point on is in consonance, and not at variance, with the terms of the writing. It is to the effect that he accepted the promissory note, payable upon a specified date, in lieu of rent, agreeing, in the event that defendants should ever be called upon to pay rent to others, that

he would indemnify them to the extent of their payment to him. This is a rational and understandable contract, and quite in accord with the writings of the parties, while the defense interposed, as we have said, is at utter variance with the terms of their written agreement. Plaintiff had the unquestioned right to enforce the payment of the promissory note according to its tenor. If there be uncertainty as to the conditions upon which the defendants would be entitled to reimbursement after payment, parol evidence would be admissible, and the trial court would be justified in receiving evidence upon that point. But since the defendants could not suffer loss so as to require indemnification, unless in fact they paid their note, it would be the absolute destruction of the terms of the contract to entertain the defense which was pleaded.

The judgment and order appealed from are therefore reversed and the cause remanded, with directions to the trial court to strike out, or otherwise refuse to entertain, the special defense above adverted to.

McFarland, J., and Lorigan, J., concurred.

[Sac. No. 999. Department Two.—December 11, 1903.]

R. A. CURTIN, Respondent, v. SALMON RIVER HYDRAULIC GOLD MINING AND DITCH COMPANY, Appellant

CORPORATIONS—INVALID EXECUTION OF NOTE AND MORTGAGE—RATIFICATION.—Where a note and mortgage of a corporation were both invalid because not authorized at a meeting of the board of directors duly assembled, the requirements of the law for ratifying the note and the mortgage are essentially different. The mortgage can only be authorized or ratified in writing in conformity with law; but authority to execute the note may be oral, and its execution may be ratified in acts *in pais*.

ID.—FACTS SHOWING RATIFICATION OF NOTE—ESTOPPEL IN PAIS.—Where the transaction of the note and mortgage was fully entered upon the books of the corporation, notice of the note was imparted to it; and where, with such notice, it received and retained the benefits of the loan evidenced by the note, and with knowledge,

and by long-continued silence, acquiesced in the contract, and never attempted or offered to rescind it, nor to restore the consideration, it must be held to have ratified the note, and an estoppel *in pais* is raised by its conduct to dispute the enforcement of the note against it.

ID.—SEPARATE ACTION UPON NOTE—JUDGMENT IN FORECLOSURE SUIT NOT A BAR.—A judgment in a former suit to foreclose an invalid mortgage, which failed because the security was held to be void, is not a bar to a separate action on the note, in which the note is shown to have been ratified by the conduct of the corporation.

APPEAL from a judgment of the Superior Court of Tolumne County and from an order denying a new trial. Joseph H. Budd, Judge presiding.

The main facts are stated in the opinion of the court rendered in the foreclosure suit, *Curtin v. Salmon River etc. Co.*, 130 Cal. 345.¹ Further facts as to ratification of the note sued upon are stated in the opinion of the court in this case.

J. P. O'Brien, for Appellant.

The note was absolutely void, for want of a quorum to act upon the resolution, exclusive of the interested director to whom it was given. (*Curtin v. Salmon River etc. Co.*, 130 Cal. 345, 349;¹ *Bassett v. Fairchild*, 132 Cal. 637.) It was also void because given to a director. (Civ. Code, secs. 2229, 2230; *San Diego v. San Diego etc. Ry. Co.*, 44 Cal. 106; *Andrews v. Pratt*, 44 Cal. 317; *Wilbur v. Lynde*, 49 Cal. 290;² *Davis v. Rock Creek etc. Co.*, 55 Cal. 359;³ *Shakspear v. Smith*, 77 Cal. 640;⁴ *Smith v. Los Angeles etc. Assn.*, 78 Cal. 289;⁵ *Finch v. Riverside etc. Co.*, 87 Cal. 601; *Wickersham v. Crittenden*, 93 Cal. 29; *Sims v. Petaluma Gas Light Co.*, 131 Cal. 659.) The judgment in the foreclosure suit is a bar to the present action. (*Reed v. Cross*, 116 Cal. 484; *Freeman v. Barnum*, 131 Cal. 386.⁶)

J. B. Curtin, for Respondent.

A note by an agent of any principal or corporation may be authorized orally. (1 Daniel on Negotiable Instruments,

¹ 80 Am. St. Rep. 132.

² 19 Am. Rep. 645.

³ 36 Am. Rep. 40.

⁴ 11 Am. St. Rep. 327.

⁵ 12 Am. St. Rep. 53.

⁶ 82 Am. St. Rep. 355.

sec. 274; 1 Parsons on Bills and Notes, p. 101; 1 Waterman on Corporations, sec. 30; *Greig v. Riordan*, 99 Cal. 322; *Crowley v. Genesee Co.*, 55 Cal. 273.) Where an oral authorization is sufficient to create an agency, the agency will be ratified by accepting or retaining the benefit of the act, with notice thereof. (Civ. Code, sec. 2310; *Bensiek v. Thomas*, 66 Fed. 104; *Mills v. Boyle Mining Co.*, 132 Cal. 95, 98; *Phillips v. Sanger Lumber Co.*, 130 Cal. 431; *Seeley v. San Jose Independent Mill etc. Co.*, 59 Cal. 23, 25.) The only point determined in the former suit to foreclose the mortgage was the invalidity of the security, which prevented a foreclosure. The question of the ratification of the note was not in issue, and was not passed upon in that suit. (*Curtin v. Salmon River etc. Co.*, 130 Cal. 345.¹) The law of the case does not apply where the facts are different. (*Heidt v. Minor*, 113 Cal. 385.)

HENSHAW, J.—This was an action upon a promissory note executed by the corporation to Thomas W. Wells, one of its directors, and by him assigned after maturity to plaintiff herein. An action was prosecuted by this plaintiff to foreclose a mortgage given by the corporation to secure the note. The decision of this court upon that action will be found reported in the 130th volume of our Reports, at page 345. That opinion contains all of the facts pertinent to the present consideration. It was there held that the mortgage was void. But while the note and the attempted mortgage were executed at the same meeting of the board of directors, and were thus both voidable at the election of the corporation, the requirements of the law for validating such an instrument as a mortgage are essentially different from those pertaining to the like validation of a promissory note. Thus, in *Curtin v. Salmon River etc. Co.*, 130 Cal. 345,¹ above quoted, it is pointed out that a mortgage to be effective must be made by the board of directors. But, under the provisions of the act of 1880, the consent of two thirds of the stockholders is requisite to its validity. The stockholders are thus made a component part of the power to make a mortgage effective, but cannot by any act of their own make a mortgage or validate one that has

¹80 Am. St. Rep. 132.

not been previously authorized and executed by the board of directors. The authorization to execute a mortgage must be in writing (Civ. Code, sec. 2309), while authority to execute a note may be oral. (1 Daniel on Negotiable Instruments, sec. 274.) The law touching the validation of a promissory note irregularly issued by a corporation, and invalid in its execution, is set forth in *Phillips v. Sanger Lumber Co.*, 130 Cal. 431, a case in principle almost identical with the one under consideration. There, as here, the action was upon a promissory note invalid in its execution; there, as here, the plaintiff claimed a ratification; there, as here, the corporation received the benefits of the loan evidenced by the note; there, as here, with knowledge, and by long-continued silence, acquiesced in the contract, and never attempted or offered to rescind; and there, as here, there is in the answer of the corporation no offer to restore the consideration. This court, in holding that the corporation was bound by its specific contract under the doctrine of ratification, said: "Nor will the result be changed if we assume that there was no authority originally for the execution of the note. An agency may be created by subsequent ratification, as well as by precedent authority (Civ. Code, sec. 2307); and where an oral authorization would suffice for conferring an agency, it will be ratified by accepting or retaining the benefit of the act with notice thereof. (Civ. Code, sec. 2310.) The case here comes clearly within these provisions. Oral authority is sufficient to create an agent to execute a note or notes (1 Daniel on Negotiable Instruments, sec. 274); and this is equally true in the case of corporations as of natural persons. (Waterman on Corporations, sec. 30; *Greig v. Riordan*, 99 Cal. 322; *Crowley v. Genesee Co.*, 55 Cal. 273.) The transaction in this case was fully entered in the books of the defendant, and notice thus imparted to it. (1 Waterman on Corporations, 480; *Holden v. Hoyt*, 134 Mass. 184.) After such notice it retained the consideration of the transaction, and thus accepted its benefits. It must therefore be held to have ratified the transaction."

This language, *mutatis mutandis*, is directly applicable to the case at bar. It would, perhaps, be more technically accurate to say that an estoppel *in pais* was raised by the

conduct of the corporation against the enforcement of the note, rather than that it had formally ratified it. (*Blood v. La Serena L. and W. Co.*, 113 Cal. 221.) But as the legal effect is the same, it can here matter but little by what name it be called.

Except for this ratification or for this estoppel, it is unquestionably true that plaintiff could not enforce the contract evidenced by the promissory note, since it would in no sense have been the contract of the corporation. And in such cases, as the authorities all hold, the recovery of the plaintiff must be, not on the express contract, which is invalid or void, but for money had and received, *quantum meruit*, *quantum valebat*, or *indebitatus assumpsit*, as the facts may warrant. But here the cause of action is directly upon the promissory note originally invalid, but made valid by the conduct of the corporation. Such an action is itself sustainable under all of the authorities dealing with like facts. We have already cited *Phillips v. Sanger Lumber Co.* as being directly in point. There may be added from our own state, *Underhill v. Santa Barbara*, 93 Cal. 306; *San Diego v. Pacific Beach Co.*, 112 Cal. 61; *Illinois Trust etc. Bank v. Pacific Ry. Co.*, 117 Cal. 332; *Gribble v. Columbus Brewing Co.*, 100 Cal. 71; and *Blood v. La Serena L. and W. Co.*, 113 Cal. 221; and elsewhere reference may be made to *Bensiek v. Thomas*, 66 Fed. 104; *Witter v. Grand Rapids Flour Mill Co.*, 78 Wis. 543; *Hotel Co. v. Wade*, 97 U. S. 13; *Union Pacific Ry. Co. v. Chicago*, etc., 51 Fed. 326.

It is further contended that by reason of plaintiff's former action to foreclose the mortgage, and his failure therein, by reason of the decision against the validity of the mortgage, he is estopped from prosecuting this action, and that the former judgment is a bar. It is to be noticed, however, that the decision itself in the former case limits its applicability strictly to the question of the mortgage lien, saying: "Whether the defendant would be estopped from contesting the claim of the plaintiff to recover the moneys advanced to it by him is not here involved. The plaintiff seeks by this action the sale of the defendant's property in payment of the note held by him, but unless the defendant has created a lien upon the property, the plaintiff cannot maintain the present action for compelling its sale." The question there presented was

one addressed to equity for the foreclosure of an alleged lien created upon real property. In an action to foreclose a mortgage the mortgaged premises constitute the primary fund out of which the debt is to be paid, and a personal judgment can only follow after the exhaustion of the security. The effect of that decision is, that there was not, and never had been, any security for the promissory note. In the present action the plaintiff seeks enforcement of the contract evidenced by a promissory note which is not, and never was, secured. That he is entitled to prosecute such an action, even though an abortive attempt was made to give security, is decided in *Powell v. Patterson*, 100 Cal. 236, where the plaintiff brought suit to foreclose a mortgage which was void. There was pretended security, but in fact no security at all, and this court held that as the mortgage sought to be foreclosed was void and of no effect, the plaintiff was entitled to a personal judgment upon the note. If in that case it was permissible for the court, in an action brought specifically to foreclose a mortgage, to declare the security void and still render a personal judgment for the amount of the note, no reason can be perceived why a plaintiff in a separate action at law upon the note alone should not be entitled to his recovery.

In conclusion, it may be said that if the ruling of the court in refusing to strike out certain parts of plaintiff's complaint was technically erroneous, it worked no possible injury to the defendant. The evidence was sufficient to establish knowledge and acquiescence upon the part of the corporation and its members.

The judgment and order appealed from are affirmed.

McFarland, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[Sac. No. 1033. In Bank.—December 11, 1903.]

**BANK OF YOLO, Respondent, v. THE SPERRY FLOUR
COMPANY, Appellant.**

ACTION AGAINST CORPORATION—VENUE—PLACE OF PERFORMANCE OF CONTRACT.—A plaintiff suing a corporation upon a contract has a right to commence the action in the county where the contract was made, or where it was to be performed. The contract is deemed to have been made in the county where the offer of one party was accepted by the other; and the place of performance, where none is expressly named, of a contract of the corporation to repay money advanced to it by the plaintiff bank, is at the bank where it can be found.

ID.—GENERAL RULE AS TO PLACE OF PERFORMANCE.—In a suit upon the contract of a corporation where no place of performance is expressly stipulated, it ought to be held performable in the place where the circumstances, viewed in the light of pertinent code provisions, indicate that the parties expected or intended it to be performed.

APPEAL from an order of the Superior Court of Yolo County refusing to change the place of trial of the action.
E. E. Gaddis, Judge.

The facts are stated in the opinion of the court.

Goodfellow & Eells, for Appellant.

E. R. Bush, for Respondent.

BEATTY, C. J.—The defendant is a California corporation, having its principal place of business in San Francisco. This action was commenced in the superior court of Yolo County, to recover money alleged to have been advanced to the defendant at its request and upon its promise to repay the same on demand. The defendant at the time of appearing in the action demanded a change of the place of trial to the city and county of San Francisco, upon the ground that it had not been sued in the proper county. The motion, subsequently made in pursuance of this demand, was overruled, and this is an appeal from that order.

The plaintiff had a right to commence the action in the county where the contract was made or where it was to be

performed. (Const., art. XII, sec. 16.) But appellant contends that the evidence upon which its motion was submitted clearly showed that the contract, if any contract was ever made, was neither made in Yolo County nor to be performed there. What the evidence does show is, that the cashier of plaintiff at Woodland, in Yolo County, called up the agent of defendant at Sacramento by telephone, and in effect offered to advance a certain sum of money to the purchaser of a lot of wheat (said to have been purchased for account of defendant) if defendant would agree to honor his draft for fourteen hundred dollars. To this proposition the agent of defendant answered by telephone that they would honor the draft. The plaintiff then advanced to the purchaser of the wheat the money which it seeks in this action to recover, and drew upon defendant for the fourteen hundred dollars, which draft was duly honored.

The question we have here to decide is not whether the evidence upon which the motion was submitted was sufficient to establish an agreement to repay to the bank the money advanced to the purchaser of the wheat. That is an issue which must await the trial of the cause. We have only to determine whether the contract alleged, if made at all, was made in Yolo County, or, if not made there, was to be performed there.

We are inclined to hold, upon the facts stated, that in legal contemplation the contract was made in Sacramento County. A contract is supposed to be made at some place, and the place where it becomes complete is the place where it is made. If a contract is made by exchange of letters or telegrams, it is held to have been made at the place where the letter is mailed, or telegram filed, containing an unconditional acceptance by one party of the offer of the other. If the communications are oral, either with or without the telephone, between parties on opposite sides of a county line, the same principle would seem to require that the contract should be deemed to have been made in the county where the offer of one is accepted by the other—in this case in Sacramento.

But if the contract was to be performed in Yolo County, the action was rightly commenced there, wherever it was made, and we think the place of performance was in Yolo County. The plaintiff is a banking corporation doing business at

Woodland, the county-seat of Yolo, and a promise to repay money advanced by it—no other place of payment being stipulated—must be deemed a promise to pay at its bank, the only place where it can be found. This, we think, is a reasonable deduction from the provisions of the Civil Code (secs. 1488, 1489), in regard to the place where an offer of performance may be made; a conclusion not affected by the decisions construing the attachment law, in which it is held that a contract for the direct payment of money is not “payable in this state” within the meaning of that law, unless made so payable in express terms. (See *Eck v. Hoffman*, 55 Cal. 501; *Dulton v. Shelton*, 3 Cal. 207.)

In a suit upon the contract of a corporation, where no place of performance is expressly stipulated, it ought to be held performable in the place where the circumstances, viewed in the light of pertinent code provisions, indicate that the parties expected or intended it to be performed.

Upon these considerations, we think the order of the superior court should be affirmed, and it is so ordered.

McFarland, J., Angellotti, J., Van Dyke, J., Shaw, J., and Lorigan, J., concurred.

[L. A. No. 1149. Department One.—December 12, 1903.]

In the Matter of the Application of E. J. CARTER for Writ of Certiorari.

PUBLIC OFFICE—ABSENCE OF PROPERTY RIGHT—PUBLIC AGENCY—TERMINATION BY SOVEREIGN POWER.—The right to hold a public office is not a species of property protected by the provisions of the constitution of the United States that no person shall be deprived of property without due process of law. A public office is a mere public agency, which may be terminated by the sovereign power which created it, and the incumbent has no private property in the office which the sovereign power must respect, in a controversy as to the right of removal therefrom.

Id.—CONDITIONS OF INCUMBENCY AND REMOVAL.—In creating an office the government can impose such limitations and conditions with respect to its duration and termination as may be deemed best, and

the incumbent takes the office subject to the conditions which accompany it. It may always be terminated in such manner and by such means as are prescribed by the law which created it, whether it provides for a removal for cause, upon notice, hearing, and a judicial proceeding, or summarily and without a hearing.

ID.—TEST OF RIGHT TO JUDICIAL INQUIRY.—The incumbent of an office has no constitutional right to a judicial inquiry and decision upon removal; and if he is removed in strict accordance with the law, it is no objection to the validity of the removal that it was done without notice or investigation, if the law does not require it. The question whether the proceeding for removal is judicial in character depends on whether or not the proceeding prescribed by the law is or is not of that description.

ID.—REMOVAL BY MAYOR UNDER CHARTER "FOR CAUSE"—SUBSEQUENT NOTICE—REMOVAL NOT JUDICIAL—CERTIORARI.—Under a city charter giving to the mayor a power of appointment, and a power to remove "for cause" any person holding office by his nomination or appointment, and requiring a subsequent written notice thereof, stating the cause to the person removed, and immediate notice to the council of his action and the reasons therefor, the exercise of the power of removal so given does not involve judicial functions, and the propriety of the removal cannot be reviewed upon *certiorari*.

ID.—EFFECT OF IMPROPER REMOVAL—OTHER REMEDIES—NUGATORY ACT.—If there is an unlawful attempt to exercise the power of removal, other equally efficient remedies are available to the officer. The prescribed mode must be pursued, or the act will be nugatory. If no cause is assigned, or no notice given, or if the cause is, in law, no cause, the attempt to remove will be ineffectual, and may be ignored by those interested.

APPEAL from a judgment of the Superior Court of San Diego County. N. H. Conklin, Judge.

The facts are stated in the opinion of the court.

Stearns & Sweet, for Appellant.

J. Wade McDonald, J. S. Callen, and A. Ruef, for Respondent.

SHAW, J.—This is an appeal by the petitioner from a judgment of the superior court of San Diego County in favor of the respondent. The proceeding was in *certiorari*, to review the order of the respondent, Frank P. Frary, as mayor of the city of San Diego, removing the petitioner from the

office of fire commissioner of the city. By the terms of the charter the fire commissioner is appointed by the mayor, subject to confirmation by the board of delegates, and holds office for the term of four years. (Stats. 1889, p. 720.) The mayor is given power to remove for cause any person holding office by his nomination or appointment. (Stats. 1889, p. 661.)

The respondent makes the preliminary objection that in making the order of removal the mayor was not exercising judicial functions, but was acting in his executive capacity, and hence that his action cannot be reviewed on *certiorari*, which lies only to review the proceedings of a tribunal, board, or officer exercising judicial functions. (Code Civ. Proc., sec. 1068.)

The authorities on the question whether or not the removal of a public officer for cause necessarily involves the exercise of judicial functions are very conflicting. Numerous decisions can be found on each side of the question. In *Mechem on Public Offices* (sec. 454) it is said: "Where the appointment or election is made for a definite term, or during good behavior, and the removal is to be for cause, it is now clearly established by the great weight of authority that the power of removal cannot, except by clear statutory authority, be exercised without notice and hearing"; and the authorities are practically uniform that, where such notice and hearing is necessary to the lawful exercise of the power, the proceeding is judicial or quasi-judicial in character.

An examination of the decisions on this side of the question shows that in the great majority of the decided cases the power of removal could be exercised under the law in force only by a proceeding which involved a notice to the officer and the hearing of a charge as a condition precedent. There are some cases, however, holding that where the statute prescribes no preliminary proceeding, but authorizes a removal "for cause," there must be a notice and hearing, and that in such cases the proceeding is judicial. (*State v. Donovan*, 89 Me. 451; *Andrews v. Board*, 94 Me. 76; *State v. Walbridge*, 119 Mo. 383;¹ *McGregor v. Supervisors*, 37 Mich. 389; *Merrick v. Board*, 41 Mich. 630; *Hayden v. Memphis*, 100 Tenn. 582; *State v. Council*, 53 Minn. 242;² *Markley v. Cape May*, 55

¹ 41 Am. St. Rep. 663.

² 39 Am. St. Rep. 595.

N. J. L. 105.) The basis of these decisions, sometimes expressly stated, but always apparently assumed, is, that the right to hold public office is a species of property which is protected by the provisions of the United States constitution declaring that no person shall be deprived of property without due process of law, and that no law shall be passed impairing the obligation of contracts. This proposition is assumed without argument. There is no doubt that it is erroneous. A public office is a mere public agency created by the people for the purpose of the administration of the necessary functions of organized society, and the agency may at any time be terminated by the power which created it. As between the office-holder and individuals in their private capacity, and perhaps as against any authority except the sovereign power itself acting in pursuance of a power of removal expressly reserved or necessarily implied from the nature of the office, the officer is entitled to the full protection of the law in his right to hold the office practically to the same extent as if it were private property. But here we have a controversy between the office-holder and that functionary of sovereignty who is invested with the power of removal, and the question is whether or not the officer has a right to the office which the sovereign power which conferred it must respect as private property. The authorities are uniform that in such a controversy the office has not the characteristics of property. (Throop on Officers, secs. 345, 346, subds. 17, 18, 19; *Connor v. Mayor*, 5 N. Y. 296; S. C., 2 Sand. 369; *Nichols v. McLean*, 101 N. Y. 533;¹ *Hoboken v. Gear*, 27 N. J. L. 273; *Kenny v. Hudspeth*, 59 N. J. L. 322; *State v. Council*, 53 Minn. 242;² *Donahue v. County of Will*, 100 Ill. 94.) In the case last cited the court says: "It is impossible to conceive how, under our form of government, a person can own or have title to a governmental office. Officers are created for the administration of public affairs. When a person is inducted into an office, he thereby becomes empowered to exercise its powers and perform its duties, not for his, but for the public benefit. It would be a misnomer and a perversion of terms to say that an incumbent owned an office, or had any title to it. . . . The officer does not own the title to the office in

¹ 54 Am. Rep. 730.² 39 Am. St. Rep. 595.

the manner that men own property; but by his commission or induction into office he acquires the legal right to exercise its functions until the end of his term, or until his resignation, removal, or its forfeiture."

It logically follows from these principles that in creating an office the government can impose such limitations and conditions with respect to its duration and termination as may be deemed best, and that in such a case the incumbent takes the office subject to the conditions which accompany it. It may always be terminated in such manner and by such means as are prescribed by the law which created it. The law may provide that a removal can be made only for cause, and after a notice, hearing, and decision, which shall have all the attributes of a judicial proceeding, or it may provide that it shall be made only for cause, but summarily and without a hearing. In either case the officer takes with knowledge of the condition; and if he is removed in strict accordance with the law it is no objection to the validity of the removal to say that it was done without notice or investigation, where the law does not require it. He has no constitutional right to a judicial inquiry and decision. The question whether the proceeding is judicial in character, therefore, depends on whether or not the proceeding prescribed by the law is or is not of that description.

In the present case the power of removal is given by the following section of the charter:—

"The mayor shall appoint all officers whose election or appointment is not otherwise specially provided for in this charter or by law. He shall have power to remove, for cause, any person holding office by his nomination or appointment; and in case of such removal shall give written notice thereof, stating the cause, to the person removed, and shall immediately notify the common council of his action and the reasons therefor." (Charter, art. III, sec. 7; Stats. 1889, p. 661.)

We do not wish to be understood as expressing any opinion as to the nature of proceedings for the removal of officers or public employees where the law requires charges to be made, followed by a notice to the officer and a hearing and investigation as to the charge, as a condition precedent to the

removal. In the case before us no such proceeding is required. In *Hoboken v. Gear*, 27 N. J. L., at page 286, the court, speaking with reference to a like power of removal vested in the common council, says: "It is contended that by using the terms 'for cause may remove,' the legislature intended to erect the council into a kind of judicial tribunal, which could not get jurisdiction of the person without notice. Such could not have been their intent. If they had so intended, they would probably have given some more provisions for its regulation, some provisions for serving notice, of compelling the attendance and swearing of witnesses; they would, at least, have used the usual terms in organizing such a tribunal. The expression is not 'for cause shown,' but simply 'for cause.' . . . It could never have been intended that upon every complaint the council should, like the Senate of the United States, resolve themselves into a high court of impeachment, to try whether or not a poundkeeper or a night scavenger had been guilty of malversation in office." The language of the section above quoted not only fails to require any hearing or proceeding, but also strongly implies that the removal shall be summary, and without any antecedent proceeding. It requires that the mayor shall give to the officer removed a written notice thereof, stating the cause, and that a similar notice shall be given to the council. If a previous notice was necessary, and a hearing of the charges was required, before a removal could be made, it would be absurd to require a subsequent notice to the same effect. We are of the opinion that it was intended that there should be no previous notice or hearing. The notice to be given afterwards is not for the purpose of enabling the officer in question to make a defense or offer evidence relating to the cause, but merely for the purpose of informing him thereof, and of making the same a matter of record. We are not inclined to hold that a power to remove without notice or hearing is a judicial function, particularly where the effect would be that this court, and the superior courts generally throughout the state, would be called upon practically to superintend the administration of the executive department in matters which often require the summary exercise of power without the delays of legal proceedings. Where no further proceedings are prescribed in the statute giving power of removal than

such as are embraced in the section in question, it should not be held to constitute an exercise of judicial functions, but rather an act of the executive department of the state.

"All political, legislative, and ministerial boards and officers are constantly, and indeed perpetually, called upon to make decisions affecting the conduct of matters intrusted to them. They exercise their judgments in so doing, and they determine the existence or non-existence of facts. . . . Such decisions, however, are not judgments pronounced by a judicial tribunal." (*Frasher v. Rader*, 124 Cal. 134.) The following cases hold that the power to remove an officer for cause is not judicial in character: *Donahue v. County of Will*, 100 Ill. 94; *Connor v. Mayor*, 5 N. Y. 285; *State v. Hawkins*, 44 Ohio St. 98; *Dongan v. District Court*, 6 Colo. 534; *Dakota v. Cox*, 6 Dak. 510; *Trimble v. People*, 19 Colo. 196;¹ *Wilson v. People*, 90 Ill. 204; *People v. Higgins*, 15 Ill. 110; *State v. Johnson*, 30 Fla. 433; *Heffran v. Hutchins*, 160 Ill. 554;² and see *Clay v. Stuart*, 74 Mich. 411.³

If there is an unlawful attempt to exercise such power, other equally efficient remedies are available to the officer. The prescribed mode must be strictly pursued or the act will be nugatory. If no cause is assigned, or no notice given, or if the cause is, in law, no cause, the attempt to remove will be ineffectual, and may be ignored by those interested.

The case of *People v. Supervisors*, 10 Cal. 344, is cited as holding that proceedings to remove an officer are necessarily judicial in character. That case is clearly distinguishable from the one at bar. At that time an act of the legislature provided, as section 964 of the Political Code now provides, that the officer required to approve official bonds could, upon subsequent information as to the insufficiency thereof, require a new bond to be given, and for a failure to comply with such requirement could cite the officer to appear at a time specified and show cause why he should not be removed, and upon such hearing could remove the officer if the new bond was not given as required after the hearing. The power to entertain these proceedings was lodged in the county judge. The county board of supervisors attempted to exercise the power, although the law did not give it to them. The court held that the

¹ 41 Am. St. Rep. 236.

² 16 Am. St. Rep. 640.

³ 52 Am. St. Rep. 353.

proceeding was quasi-judicial in nature, and that, as the supervisors had attempted to exercise the power in the absence of any authority, it was clearly an attempt to exercise judicial power which they did not possess. The distinction between that case and this is, that in that case the express provisions of the law had prescribed a proceeding which had all the attributes of a judicial proceeding, and therefore it was declared to involve the exercise of judicial functions. In the case at bar, as we have seen, there is no such express provision, and the proceeding which is required cannot be declared to be an exercise of judicial functions. It follows from these considerations that the mayor was not exercising judicial functions in making the removal complained of, and hence that a writ of *certiorari* will not lie. This, as we understand it, was the conclusion of the court below, and we entirely agree with that conclusion.

The judgment appealed from is affirmed.

Angellotti, J., and Van Dyke, J., concurred.

[Crim. No. 1005. In Bank.—December 12, 1903.]

THE PEOPLE, Respondent, v. LEUNG OCK, Appellant.

CRIMINAL LAW—MURDER—SELF-DEFENSE—EVIDENCE—POSSESSION OF MONEY.—Upon a prosecution for murder, where the defendant sought to justify the killing upon a plea of self-defense, and the prosecution sought to show that the deceased had money in his cabin, and that defendant was in funds immediately thereafter, and the defendant testified that the deceased had made a demand upon him for money, evidence is admissible to show that the defendant had used part of a Chinese company's money, as pertinent in the establishment of those matters; and it was neither the intent nor the effect of such evidence to hold the defendant before the jury as an embezzler.

ID.—TEMPERAMENT AND DEemeanor OF DEFENDANT.—Where it appears that the defendant visited the witness, it was proper to ask the witness as to his actual knowledge of the temperament of the defendant,—if jovial, pleasant, talkative, or otherwise,—where it was

proposed to follow the question by showing that his demeanor upon the visit he made after the homicide was different from that usual to him.

ID.—EXPLANATION OF EVIDENCE AT PRELIMINARY EXAMINATION.—An objection that the court erred in refusing to allow the defendant to explain his reasons for giving different testimony at the preliminary examination from that given upon the trial was not tenable, where the court merely sustained a proper objection as to whether he gave correct testimony at that other hearing, in advance of any testimony given by him at the trial, but he was subsequently allowed to explain and did explain fully that his testimony at the preliminary hearing was false, and that he testified falsely through fear.

ID.—OBJECTION TO PRELIMINARY EXAMINATION—PURPOSE OF PRESENCE OF INTERPRETER.—An objection that there had been no valid preliminary examination, and that the interpreter thereat was in court for the express purpose of prosecuting the defendant, was properly overruled, where, so far as the record discloses, there was a valid preliminary examination, and defendant admitted that he was informed thereat as to his right to counsel, and to have witnesses subpoenaed and examined in his behalf, and, so far as the record discloses, the interpreter was not present in court for the purpose stated.

APPEAL from a judgment of the Superior Court of Siskiyou County and from an order denying a new trial. J. S. Beard, Judge.

The facts are stated in the opinion of the court.

James D. Fairchild, for Appellant.

U. S. Webb, Attorney-General, and E. B. Power, Deputy Attorney-General, for Respondent.

HENSHAW, J.—The defendant was informed against for the murder of one Wing Ga in the county of Siskiyou, was tried and convicted of murder in the first degree, and the death penalty was imposed. He appeals from the judgment and from the order denying him a new trial. The points presented upon appeal are briefly stated by his counsel without argument and without citation of authority. They have, however, one and all, been carefully examined, and the conclusion has been reached that they are without merit.

1. It is asserted that the court erred in allowing Chong Chung to testify as to the defendant having used part of a Chinese company's money, and it is said that this testimony had a tendency to hold the defendant before the jury as an embezzler. Such, however, was neither the intent nor the effect of the evidence. The defendant admitted the killing, but sought to justify upon the plea of self-defense. From his own evidence it appears that the deceased had made a demand upon him for money. It was further sought to be shown by the prosecution that the deceased had money in his cabin; that the defendant was penniless before the homicide, and was in funds immediately thereafter. In the establishment of these matters the question was pertinent.

2. It is alleged that the court "erred in allowing Wong Chu Quan to testify as to his conclusions as to the kind of a man defendant was." Here a citation is given to folio 268. No such evidence is found at this folio. Elsewhere in the record it appears that the defendant visited the witness, and the latter was asked as to the temperament of the defendant—if jovial, pleasant, talkative, or otherwise. It was explained that the question went only to the witness's actual knowledge in this regard, and that it was proposed to follow this question by showing that his demeanor upon the visit he made after the homicide was different from that usual to him. The question was pertinent and permissible.

3. Again it is asserted that the court erred in refusing to allow the defendant to explain his reasons for giving different testimony at the preliminary examination from what he gave upon the trial of the case. To this the answer is, that a question was asked of the defendant at the outset of his examination as follows: "Did you give correct testimony at that other hearing?" The objection was sustained to this, the court stating that it sustained the objection for the time being. The ruling was manifestly proper, as at that point in the proceedings it did not appear what testimony the defendant was about to give. Later, however, he was allowed to explain, and did explain fully, that the testimony which he gave at the preliminary hearing was false, and he was permitted further to explain the reason why he testified falsely, stating that he did so through fear.

4. It is said that the court "erred in allowing the defendant to testify as to the discrepancies between the testimony of defendant at the preliminary examination and at the trial, over our objection that there had been no valid preliminary examination, and that the interpreter at said examination, Fong Loon, was here for the express purpose of prosecuting the defendant." There is no citation to the record to support any of these statements, and we have searched it in vain for their corroboration. So far as the record discloses, there was a valid preliminary examination; so far as the record discloses, Fong Loon was not present for the express purpose of prosecuting the defendant; so far as the preliminary examination is concerned, it appears from defendant's own statement that he was informed as to his right to counsel, and as to his right to have witnesses subpoenaed and examined upon his behalf.

These being all the points presented for consideration, and an independent examination of the record disclosing no others meriting attention, the judgment and order appealed from are affirmed.

Lorigan, J., Van Dyke, J., McFarland, J., Shaw, J., Angellotti, J., and Beatty, C. J., concurred.

[Sac. No. 937. Department Two.—December 16, 1903.]

CATHERINE MANN, and ESTHER DURGAN, Respondents, v. SUSAN A. MANN et al., Appellants; D. L. MANN, Intervener.

ESTATE FOR LIFE OF GRANTOR—CONSTRUCTION OF CONTRACT—LEASE—GRANT.—A contract between a mother and her son, by which, in consideration of past care and attention, and on condition that the son shall supply her with necessities and give her such care as her age and condition may require, "so far as he is able to do so," she granted to him all of her personal property, and also all of her interest in a homestead entry, with the right to cultivate or rent the same during her life, and to prove up as sole heir to the land after her death, is not a lease, for want of a certain rent, and for

want of validity as a lease of agricultural land, but is to be construed as making to the son a grant of a freehold estate for the life of the mother.

ID.—GRANT IN FEE BY TENANT FOR LIFE—TERMINATION OF LIFE ESTATE

—GRANT BY PATENTEE—ADVERSE POSSESSION—PRESCRIPTIVE TITLE.

—Where the tenant for life, claiming to be the absolute owner of the homestead under the contract, granted an estate in fee to one of the plaintiffs, under whom the other plaintiff claims, the possession of the grantee of such estate, after the termination of the life estate, by the death of the mother, became adverse to the grantee of the mother, who had herself obtained a patent for the homestead and granted it to the testator of the defendants, and where such adverse possession was accompanied by the payment of all taxes upon the lands and was continuously hostile for the statutory period, it ripened into a prescriptive title, which the law will protect as against the defendants.

APPEAL from a judgment of the Superior Court of Tuolumne County and from an order denying a new trial.
G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

F. W. Street, for Appellants.

J. P. O'Brien, for Respondents.

McFARLAND, J.—This is an action to quiet title to certain agricultural lands. Judgment went for plaintiffs, and from the judgment and an order denying a new trial defendants appeal.

The plaintiff Esther Durgan claims an undivided half of the land in contest under a conveyance from the plaintiff Catherine Mann, executed a short time before the commencement of this action, and her right to recover depends upon the right of said Catherine. The court found that plaintiffs have title to the premises by prescription, and that "for more than five years before the commencement of this action the plaintiff Catherine Mann has been in the open, visible, notorious, adverse, hostile, exclusive, continuous, and uninterrupted possession of all the lands, premises, and property described in the amended complaint herein"; that during said time she has "occupied and claimed said land and premises as of her own sole, separate, and indefeasible estate, and ex-

clusive of any other right or interest"; and that during said time she had paid all taxes on the land. These findings are fully justified by the evidence, which shows, indeed, that for more than twenty years continuously before the bringing of the action said plaintiff, and her predecessor, Daniel L. Mann, had held adverse possession of the land under claim of ownership, unless they were estopped from asserting such adverse holding by reason of an alleged relation of landlord and tenant.

The facts upon which this alleged estoppel is based are these: On September 13, 1876, the land here in contest was United States public land, and one Sarah A. Mann had filed a homestead entry thereon, and on that day she executed to her son, Daniel L. Mann, the following instrument: "This agreement, made this 13th day of September, A. D. 1876, between Sarah A. Mann, the party of the first part, and Daniel L. Mann, the party of the second part: Witnesseth: That for the consideration of the care and attention heretofore given by my son, the said Daniel L. Mann, and for the further consideration hereinafter set forth, the said party of the first part hereby grants to the party of the second part, all of her personal property, and hereby authorizes him to take immediate possession thereof; also all of my interest of, in or to the homestead right of the party of the first part of, in or to the land described in the certificate of homestead entry, No. 1903, of the receiver of the U. S. land office at Stockton, California, giving to my said son the right to cultivate or rent the same or any part thereof during my lifetime, with full power at my death to prove up on the same as my sole heir to said land, reserving herein the right to occupy and reside in the house on said land so long as I may live. This grant of the right to cultivate and lease the land during my lifetime is given on condition that my son shall supply the necessaries of life for me so long as I shall live, and give me such care as my age and condition may require, so far as he is able to do so. In witness whereof," etc. Upon the execution of this instrument, Daniel went into possession and inclosed the land by a fence, and held it continuously until 1890, undoubtedly believing that the land would be his absolutely after the death of his mother, and claimed it as his own. On December 17, 1890, Daniel, by deed, conveyed the

land in fee to his wife, Catherine Mann, plaintiff herein, who, as before stated, held and claimed the same absolutely under such deed. But Sarah A. Mann, notwithstanding her attempt by said instrument of September 13, 1876, to give Daniel the right to prove up on the homestead and get the government title after her death, herself made final proof on the homestead entry, and on May 20, 1882, received a United States patent, conveying said land to her. Afterwards, on October 12, 1885, she executed a deed to John F. Mann, purporting to convey him in fee all of said land. Afterwards, in December, 1894, John F. Mann died testate, and devised said land to the defendants in this action, who claim under him. Afterwards, on October 4, 1892, Sarah A. Mann died.

Now, the contention of appellant is, that under the foregoing facts the relation of landlord and tenant continuously existed from the date of the instrument of September 13, 1876, to the commencement of this action; that such relation existed between Daniel and his mother, Sarah, and afterwards her grantee, John F. Mann, from 1876 to 1890, when he conveyed to the plaintiff Catherine; that such relation existed continuously between Catherine, on the one side, and Sarah A. Mann until her death, and John F. Mann and his devisees, the appellants, on the other, from the date of the deed to Catherine and her possession until the commencement of this action; and that, therefore, Daniel and Catherine, who are assumed to have been tenants, could not assert any claim to the land adversely to the other parties above named, who are assumed to have been the landlords. In our opinion, this position is not tenable.

Most of the decisions touching the relation of landlord and tenant deal with a lease of the usual character,—that is, where there has been created an estate for years, called the "term"; and the instrument here in question did not create an estate of that character. It was not a lease. It was substantially a conveyance of a freehold estate for life, and the relation of the parties thereto was that of grantor and grantee—not that of landlord and tenant. It is true that where in a deed conveying an estate for life there is an express reservation of rent, with a covenant by the grantee to pay it, the instrument may for some purposes be treated as a lease. But by the instrument in question here an estate for life is created,

in consideration of past kindness of the grantee to the grantor, and of the hazy and uncertain implied promise of the grantee that during the life of the grantor he will supply the latter with necessaries, and, "as far as he is able to do so," will give her such care as her "age and condition may require." In this promise there is no such element of certainty as is necessary to constitute rent, which is an essential part of a lease. What effect a failure of the grantee to comply with the condition named would have had upon his estate is not a question involved in the case. Moreover, it is provided in section 717 of the Civil Code that no lease of land for agricultural purposes for a period of more than ten years shall be valid. The instrument in question, therefore, could have no validity as a lease. It was valid as a conveyance of a freehold estate for life, or it had no validity whatever; and when the life estate terminated by the death of Sarah A. Mann, the remainderman or reversioner had the immediate right to possession, which he must have asserted within the statutory period of limitations. The plaintiff Catherine, having taken a conveyance in fee from the tenant for life, was not estopped from claiming adversely to respondents, or their testator, *after the termination of the life estate*. In *Jackson v. Harsen*, 7 Cow. 323,¹ Woodward, J., speaking for the court, having said that so long as the life estate continued there could be no adverse holding by the tenant for life as against the reversioner, proceeds as follows: "When that ceased, the right of entry accrued. If, after the termination of the life estate the reversioner permits the representatives of the tenant for life to hold, claiming as their own, beyond the time limited for bringing actions, the right to recover is gone. I consider this proposition as settled law." In *Saunders v. Hanes*, 44 N. Y. 365, Gray, C., says: "It may be stated as a general proposition that when the tenant for life has conveyed his estate in fee the possession will become adverse from his death (3 Washburn on Real Property, 30)," and repeats the language used in *Jackson v. Harsen*, above quoted. In *Miller v. Ewing*, 6 Cush. 34, Shaw, C. J., speaking for the court, says: "The right of the reversioners accrued at the death of the tenant for life in 1833, . . . and the statute of limitations begins to

¹ 17 Am. Dec. 517.

run from that time," citing *Tilson v. Thompson*, 10 Pick. 359. In *Gernet v. Lynn*, 31 Pa. St. 94, the court says: "The statute of limitations does not run against parties in remainder until after the death of the tenant for life who has aliened the fee." In *Müller v. Müller*, 129 Ill. 630, the court, speaking of a purchaser from the tenant for life, say: "The possession of the purchaser is not, and cannot be, during the continuance of the life estate, adverse to the remainderman or reversioner, so as to set the statute of limitations running against such remainderman or reversioner; but after a life estate falls in, the possession will be adverse as to a remainderman or reversioner." There are many other authorities to the same point, but the foregoing are sufficient to be here cited. Our conclusion is, that respondents were not estopped from asserting the adverse possession found by the trial court, and that therefore the judgment was right. These views are determinative of the case, and there are no other phases of the discussion of counsel which call for special notice.

The judgment and order appealed from are affirmed.

Lorigan, J., and Henshaw, J., concurred.

[S. F. No. 3643. Department One.—December 18, 1903.]

In the Matter of the Estate of DRURY MELONE, Deceased.
HENRY C. MELONE, Appellant, v. SARAH B. MELONE, Respondent.

ESTATES OF DECEASED PERSONS—PROBATE OF WILL—PUBLICATION OF NOTICE OF HEARING—LEGAL "NEWSPAPER."—The publication of the hearing of the notice of the probate of a will of a deceased person is regulated by section 1303 of the Code of Civil Procedure, which merely requires publication thereof "in a newspaper of the county"; and the Recorder, a legal newspaper published in the city and county of San Francisco, is a "newspaper of the county" within the meaning of that section.

Id.—ACT DEFINING "NEWSPAPER OF GENERAL CIRCULATION"—CONSTITUTIONAL LAW—TITLE OF ACT—EXCLUSION OF LEGAL PROCEEDINGS.—

The title of the act of March 25, 1903 (which adds sections 4458 and 4459 to the Political Code, and provides for publications in a "newspaper of general circulation," and purports to define that phrase), is limited exclusively by its terms to publications made by state officers, and commissioners and common councils, boards of trustees, or supervisors in counties, cities, cities and counties, or towns; and the act is unconstitutional under article IV, section 24 of the constitution, in so far as it attempts to include any other class of publications in the body of the act. The act is inapplicable to and excludes all publications made in legal proceedings in the various courts of this state.

APPEAL from an order of the Superior Court of the City and County of San Francisco admitting a will to probate. J. V. Coffey, Judge.

The probate of the will was contested on the ground that the publication of the notice of hearing was made in the Recorder, a law journal and daily newspaper published in the city and county of San Francisco, and was insufficient, on the ground that it was not made in a "newspaper of general circulation."

Stanley Moore, P. F. Dunne, and James H. Budd, for Appellant.

Chickering & Gregory, and Garrett W. McEnerney, for Respondent.

SHAW, J.—This is an appeal from an order admitting to probate the last will and testament of Drury Melone, deceased. The only point made upon the appeal is, that the notice of the time and place appointed for proving the will was not published in a newspaper of general circulation, according to the definition of such newspaper as given in section 4459 of the Political Code, a section added to that code by the legislature of 1903. (Stats. 1903, p. 478.) Section 1303 of the Code of Civil Procedure provides, that when the petition for the probate of a will is filed the clerk of the court must set the petition for hearing upon some day, and must give notice of the hearing "by publishing the same in a newspaper of the county." It is admitted that the newspaper in which the notice in question in this case was published was a newspaper

of the county within the meaning of this section, and that, unless section 4459 of the Political Code requires a newspaper of a different character, the publication was in all respects legal.

We are of the opinion that in so far as section 4459 of the Political Code, purporting to define the meaning of the phrase "newspaper of general circulation," appears to be applicable to a publication made in the course of proceedings for the probate of a will it is unconstitutional and void. The title of the act of March 25, 1903, is as follows: "An act to add a new title to part IV of an act entitled, 'An act to establish a Political Code,' approved March 12, 1872, to be known as title V, regulating publications by state officers and commissioners, common councils, boards of trustees, or supervisors, in counties, cities, cities and counties, or towns." The title V thus enacted consists of two sections of the Political Code, numbered respectively 4458 and 4459. Section 4458 is as follows: "Whenever any publication, or notice by publication, or official advertising is required to be given or made by the provisions of this code, the Civil Code, the Code of Civil Procedure, the Penal Code, or by any law of the state, by any officer now existing, or any hereafter to be created, in this state, or any political subdivision thereof, or by any officer of a county, city, city and county, or town, such publication or notice by publication, or official advertising, shall be given or made only in a newspaper of general circulation, where such a newspaper is published within the jurisdiction of said official." The title relates exclusively to publications made by state officers and commissioners, common councils, boards of trustees, or supervisors, in counties, cities, cities and counties, or towns. By the provisions of section 4458, above quoted, an attempt is made to provide regulations for publications required by either of the codes, or by any law of the state, to be made by any officer now existing or hereafter created in this state or any political subdivision thereof. Thus it is attempted to include in the body of the act a large class of publications which are not mentioned or referred to in the title. We are not disposed to be critical of the sufficiency of the title of an act where general terms are employed which are susceptible of subdivision into a large number of subordinate parts. But where the legislature sees fit, after employing gen-

eral terms, to go further in the title and point out specifically the precise parts to which it is intended that the act shall relate, this limits the effect of the act to the subjects thus pointed out. Article IV, section 24, of the constitution declares: "Every act shall embrace but one subject, which shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title." Section 4458 declares that the publications there specified shall be made only in a newspaper of general circulation. The following section, number 4459, which defines what is meant by the phrase "newspaper of general circulation," of course refers to the publications described in section 4458, and is to be considered as intended to define what newspaper shall be sufficient in character to come within the definition of the term, as used in the preceding section. In its application, therefore, section 4459 is limited by the effect of section 4458, and the definition of a newspaper embodied in section 4459 has no application except to publications lawfully required and regulated by section 4458. In so far as section 4458 is unconstitutional, section 4459 is inoperative. Under the provisions of the constitution above quoted, the effect of section 4458 is limited to the specific subjects expressed in the title, and the section is valid only with respect to publications made by state officers and commissioners, common councils, boards of trustees, or supervisors, in counties, cities, cities and counties, or towns. And the effect of section 4459 is necessarily confined to the same classes of publications. This classification excludes all publications made in the course of legal proceedings in the various courts of the state, and as to such publications the entire act is void and inapplicable. Therefore, the contention of the appellant that the publication of the notice in question was not made in a newspaper of the character that would make it a legal publication is not well taken.

The order appealed from is affirmed

Angellotti, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[Sae. No. 1091. Department One.—December 19, 1903.]

**WILLIAM S. MOSS, Respondent, v. MARY B. ODELL,
Appellant.**

MORTGAGE—DEED ABSOLUTE—POSSESSION OF MORTGAGEE—ACCOUNTING—COMPENSATION.—In an action by the mortgagor for an accounting and reconveyance of property conveyed to a mortgagee by deed absolute in form, intended as a mortgage, the mortgagee in possession is not entitled to compensation.

ID.—ITEMS OF ACCOUNT—MONEYS RECEIVED TO USE OF MORTGAGEE—MONEYS DISBURSED—STATUTE OF LIMITATIONS.—Moneys received by the mortgagee in possession to the use of the mortgagor, as the owner of the equitable interest, were properly chargeable to the mortgagee; and the mortgagee should have been credited with moneys paid to the mortgagor and to his use. The statute of limitations as to the accounting only begins to run from the last item charged on either side.

ID.—PAYMENT OF NOTE OF MORTGAGEE TO MORTGAGOR—APPLICATION OF PAYMENTS—TIME OF ADVANCES.—Payments made by the mortgagee to the mortgagor, without direction as to their specific application, are to be regarded as applied on a note of the mortgagee to the mortgagor which was due prior to the mortgage, and the advances by the mortgagee under the mortgage must be regarded as commencing only upon the satisfaction of such note.

ID.—DELIVERY OF PAID NOTE MORE THAN FOUR YEARS AFTER MATURITY.—The subsequent delivery of the satisfied note to the mortgagee more than four years after its maturity is without significance, so far as treating it as discharged by payments of the mortgagee applied thereon is concerned.

ID.—REJECTION OF CREDITS—GREATER ERROR IN INTEREST—APPELLANT NOT INJURED—AFFIRMANCE OF JUDGMENT.—Where the rejection of credits which should have been allowed to the mortgagee appellant were more than offset by an error in the interest account in favor of the mortgagee, so that the result of a correct statement of the account would show a less indebtedness on the mortgage than that allowed by the court, the appellant is not injured by the result; and the judgment determining the amount of indebtedness secured by the mortgage will be affirmed.

ID.—INTERLOCUTORY DECREE—REFERENCE—AFFIRMANCE—PRINCIPLES NOT FIXED—CONSENT TO HEARING BY COURT—REVIEW UPON APPEAL.—Where an interlocutory decree for an accounting affirmed by this court ordered a reference to take the account against a mortgagee in possession, but did not purport finally to determine the rights of the parties as to the rules or principles upon which the account was to be taken, and by consent of the parties the reference was aban-

done, and a hearing had by the judge, the matter and method of the accounting was thereby set at large, and the decision of the court is subject to review in this court.

1D.—CONSTRUCTION OF FINDING—NON-PAYMENT OF NOTE—LEGAL SATISFACTION.—A finding as to non-payment of the note from the mortgagor to the mortgagee, taken in connection with the other findings, is construed to mean that there was never any express application of the advances as a payment thereon, and not that the note was not in fact satisfied by the legal application of the moneys advanced to the mortgagee as payments thereon.

APPEAL from a judgment of the Superior Court of San Joaquin County. G. W. Nicol, Judge presiding.

The facts are stated in the opinion.

Louttit & Middlecoff, for Appellant.

Budd & Thompson, for Respondent.

SMITH, C.—This suit was brought against defendant in possession, under a deed from the plaintiff to her, of date November 29, 1889, which, the complaint alleges, was intended as a mortgage. The deed was absolute on its face, but was accompanied by a written agreement, by the terms of which the defendant agreed to reconvey to the plaintiff on the twenty-ninth day of November, 1894, if on or before that date he should have repaid to defendant all advances made by her for the benefit of plaintiff for taxes or assessments on the land conveyed or otherwise. The complaint prayed for an accounting and reconveyance and for general relief. On a former trial the court found that the transaction was intended as a mortgage to secure the advances contemplated, and adjudged that at the date of the transaction the plaintiff was, and ever since has been, the owner of the land in question; that the defendant was a mortgagee in possession, and that an accounting was necessary to a final determination of the rights of the parties herein; which was ordered accordingly. The judgment was affirmed on appeal. (*Moss v. Odell*, 134 Cal. 464.) The present appeal is by the defendant from a subsequent judgment settling the account between the parties, and adjudging a balance against the plaintiff of three hundred dollars, upon the payment of which he is to be let into pos-

session; otherwise the mortgage to be foreclosed. The points urged by appellant for reversal relate exclusively to the account; to which it is objected—1. That defendant was improperly charged with her note to the plaintiff for the sum of \$3,409, of date June 2, 1887, payable two years after date, with ten per cent interest; 2. That the sum of nine hundred dollars received by her for the sale of certain land, called the Butterick place, was also an improper charge; and 3. That she should have been credited with the sum of five hundred dollars paid to one Bullock, on a note for that amount made by the plaintiff to one William L. Moss, and the sum of two hundred dollars claimed to have been paid to plaintiff himself, and also with a reasonable compensation for the care of plaintiff and his property.

These objections, other than the first, may be briefly disposed of. The defendant, as mortgagee in possession, was not entitled to compensation. (3 Pomeroy's Equity Jurisprudence, sec. 1217.) As to the items of five hundred dollars and two hundred dollars, it may be assumed that they should have been allowed. As to the item of nine hundred dollars charged against her for money received from the sale of the Butterick place, this seems to be supported by her own evidence, which, we think, was not inconsistent with the fact that when the sale was made she held the title to that and other lands conveyed to her by the plaintiff. Notwithstanding this, the plaintiff may have had an equitable interest, and if this was the case, the money was received by the defendant, as she says it was, for the use of the plaintiff. Nor can it be held that this or any other item of receipts or disbursements was barred by the statute. (Code Civ. Proc., sec. 344.) Otherwise, the defendant's right of action to foreclose would also be barred.

This leaves us to consider only the defendant's note to plaintiff, which it is in effect found by the court—referring to the mortgage—was not delivered to the defendant "at the time, or as part of the same transaction," but was "received from" plaintiff by defendant, November 21, 1894,—that is to say, more than four years after it became due, at which time, it is claimed by the appellant, it was barred by the statute of limitations. But in fact the note had been satisfied in the year 1890, by payments made Mrs. Odell, without direction as

to their specific application, and hence to be regarded as applied on the note. (Civ. Code, sec. 1479, subd. 3.) This accounts for the subsequent delivery of the note to Mrs. Odell, which is therefore without significance. The advances by Mrs. Odell under the contract of November 29, 1889, must therefore be regarded as commencing only upon the satisfaction of the note in 1890.

In stating the account, as we have seen, the court disallowed the items of five hundred and two hundred dollars, which we have assumed should have been allowed, and also fifty dollars paid by Mrs. Odell as interest on the former item. But there is a countervailing error in favor of the defendant, which is, that she is allowed interest at eight per cent per annum upon all her advances, and charged with seven per cent only on her receipts, from their respective dates until the first day of February, 1902. But this is incorrect, both as to different rates of interest and method of computation; for all moneys received by her operated when received to reduce the plaintiff's indebtedness to her *pro tanto*, thus reducing the interest-bearing principal. Upon this basis, allowing Mrs. Odell her rejected credits, and crediting to Moss her receipts at their respective dates, the result of a correct statement of the account will be to show that Moss's indebtedness to her (if there is any) is much less than that allowed by the court. She is therefore not injured by the result.

We advise that the judgment appealed from be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Shaw, J., Van Dyke, J., Angellotti, J.

The following opinion was delivered by the court in Bank upon denial of a petition for rehearing January 16, 1904:—

THE COURT.—The petition for rehearing is denied. The rules or principles upon which the account was to be taken and stated were not irrevocably fixed and settled by the former interlocutory decree, and the decision of this court affirming the same. (*Moss v. Odell*, 134 Cal. 464.) That part

of the interlocutory decree does not of itself purport to finally determine the rights of the parties, but was a mere direction to the referee to take proof and report as to certain facts. The report was to be made to the court. The matter was still *in fieri*, and the court could at any time change the directions to the referee. In fact, however, the reference was abandoned, and by consent of the parties the evidence relating to the account was heard by the judge of the court below and the account was stated by him as part of the findings. This set the matter at large with respect to the interest to be allowed and the method of casting the account, and leaves it subject to review by this court on this appeal.

Nor is there anything in the opinion upon the former appeal purporting to declare the law upon these points, or to affirm this part of the interlocutory decree. On the contrary, that opinion expressly left open the questions relating to the rules and principles upon which the account should be settled and the credits adjusted, thus in effect holding that the decree then before the court was not final in these particulars, and this, whether correct or not in principle, has thus become the law of the case. We construe the finding that the note for \$3,409 was not paid, taken in connection with the other findings, to mean that there never was any express application of the advances as a payment, and not that the note was not in fact satisfied by the moneys advanced.

[Sas. No. 951. In Bank.—December 19, 1903.]

ELIZA M. E. HARTLEY, Respondent, v. FRANK M. VERMILLION, and FRANK H. BUCK, Appellants.

PUBLIC HIGHWAY—OBSTRUCTION—INJUNCTION.—Where it appears that a road claimed by the defendants as a private road was laid out or designated by the parties through or across whose land it ran first, and has since been used by all persons who had occasion to pass that way, and became dedicated or abandoned to the public prior to the placing of an obstruction thereon by the defendants, this constituted it a highway, or public road, within the terms of the statute as well as at common law, and the defendants were prop-

only enjoined from obstructing or interfering therewith, to the injury of the plaintiff.

Id.—“PRIVATE” AND “PUBLIC” ROADS—POWER OF LEGISLATURE—CLASSIFICATION OF HIGHWAYS.—The legislature has no power to lay out “private” roads so as to make them the property of individuals or private ways at common law; but the road laid out as a “private road” becomes a public way, over which all may lawfully pass who have occasion. The distinction between “public” and “private” roads is one merely of classification of highways.

Id.—PREScriptive USE OF ROAD—IMPLIED DEDICATION.—Where, as in this case, the public, or such portion of the public as had occasion to use the road, traveled over the same without asking or receiving any permission, and without objection from any one, for the period of time beyond that required by law to bar a right of action, a right in the public to the use of the road arises by prescription or implied dedication.

Id.—ESTOPPEL OF DEFENDANT.—Where one of the defendants sold to the plaintiff a strip of land along his north line for the purpose of a right of way from the plaintiff’s premises to the road in question, as a means of reaching a public highway, such defendant is estopped from denying as against the plaintiff that there was a dedication of the road in question.

APPEAL from a judgment of the Superior Court of Solano County and from an order denying a new trial. A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

Raleigh Barcar, and O. R. Coghlan, for Appellants.

M. A. Wheaton, I. M. Kalloch, and George A. Lamont, for Respondent.

VAN DYKE, J.—This action was brought to declare a strip of land running north a mile and a quarter to a mile and a half from the county road in Solano County, commonly called the E. R. Thurber road, to the south line of defendant Vermillion’s so-called home place, a public highway, and to restrain defendants from obstructing the same. The answer denied that the so-called road or highway was a public road or highway, but averred that the same was a private road, the property of the defendants, in which the general public had no interest whatever. The court found in favor of the plain-

tiff, and entered judgment accordingly, and enjoined the defendants from obstructing or interfering with the said public road; from which judgment and the order denying defendants' motion for a new trial the defendants appeal. The main point on the appeal is the contention on the part of the defendants that the evidence does not sustain the finding of the court that the road in question is a public road and highway.

The following is a summary of the evidence on the part of the plaintiff: William Lockie testified in substance that he had known the road in dispute eight or ten years, and has used it and seen others use it. He used it off and on for about ten years prior to 1898, and has been in the habit of traveling over the same since, and while traveling over the road no one ever objected. "I never asked permission of Mr. Vermillion or Mr. Buck, or any one else, to travel that road." James Lockie, another witness for plaintiff, testified that he had known the road in dispute for eight years and had used it for about five years. "When I traveled the road in dispute I never asked permission of any one. I didn't know I had to. . . . While traveling it I could see no difference between it and other roads which had been known to be county roads, but it was not quite as wide as others." E. A. Peabody, another witness for plaintiff, testified that he traveled the road, and that no objection was made to his doing so at any time, and he asked no one's permission to travel it. It was open, and people seemed to be going and coming, and he supposed it to be all right. Michael Farrell, also for the plaintiff, testified he had known the disputed road for about twenty years; had been over it, he thought, before any of the land belonged to Mr. Buck (defendant). "When I traveled the road no one objected to it, nor did I ever ask any one's permission to travel it. It was not necessary, as it appeared to me." R. E. Burton, also for the plaintiff, testified that he had been perfectly familiar with the road for about twenty-two years, and had used it whenever he wanted to. "I have never asked any one's permission to use the road this side of Mr. Vermillion's. I never asked any one's permission to travel the road between Mr. Vermillion's upper place and E. R. Thurber road, and no one ever made an objection to my traveling it. I never asked any one's permission to travel over the disputed road prior to 1898. I did not ask permission, because those people

traveled it, and we were doing just the same as other people were doing." James Burton testified similarly. I. K. Buck, also a witness for the plaintiff, testified he had been familiar with the disputed road about fifteen years, and resided on it, the second house from the E. R. Thurber road. It passes over his (the witness's) land. From the so-called Thurber road up to Vermillion's home place he thinks it is a mile and a half. He says: "No one ever objected to my traveling over any part of the disputed road, and I never asked permission to use any portion of it." William H. Buck, also for the plaintiff, testified that he was familiar with the disputed road, and had been for something like eighteen years. He had used it as far as his place all that time. His place is on the disputed road, which runs across one end of his land about eighty rods. He says: "I never, in the use of this road, asked or received permission from any one to travel it, or any part of it. So far as it passes over my land, I never gave any one permission to pass over it. I never objected to any one going over, and do not recollect that any one ever asked my permission. I had no other way out to the Thurber road only this road." W. W. Smith, also for the plaintiff, testified that he is a resident of Vacaville, and had known the disputed road since 1859, traveling over it in the spring and summer of that year. "I never asked any one's permission to travel it." On cross-examination he admits that he got defendant Vermillion's permission to cross his upper place, but says he did not get any one's permission to travel the disputed road, which did not pass into or over that upper Vermillion place at all. It commenced at the south line of Vermillion's upper place and ran south to the so-called Thurber road, which is admitted to be one of the public highways of that county. He says he never knew of the public being prohibited from traveling that road until last summer, when the defendants put a gate across it to stop Hartley from traveling it. D. J. Parmelee, another witness for the plaintiff, testified that he lived some distance north of the north end of the disputed road, and has known the said road for about nineteen years, and has traveled the same. "I never asked permission to travel over the disputed road before last summer. That was the time when the gate was put across it as already stated." Ralph H. Platt, for the plaintiff, testified that he resided in Vacaville, and had traveled the road since May 1, 1874. "I never asked anybody's

permission to travel over it. I did not think it was necessary. I thought it was a public road up until a little while ago, a little before last August, as I remember it, and there was never any objection made by any one to my traveling it." C. M. Hartley testified that he had been the agent for his mother, the plaintiff, and had traveled the disputed road for some fourteen years without any objection from any one, or without asking any one's permission. The ranch, or place, of the plaintiff of which the witness acted as agent is to the east of defendant Vermillion's upper or home place, and prior to 1895 he had been accustomed to pass through the defendant Vermillion's upper place, and thence down to the road in dispute. In December, 1895, he was served with a notice by Vermillion thereafter not to pass over said land. The notice says: "The land referred to is situate in Vaca Township, Solano County, California, and is bounded on the north by land of Hatch, and on the east by land of Hartley, on the south by land of F. H. Buck, and on the west by land of F. B. McKevitt and land of F. H. Buck, and known as the Vermillion ranch or farm." This tract does not include any of the disputed road, but lies to the north of it. This witness also produced an agreement entered into between the plaintiff and the defendant Buck for the sale of a strip of land on the northerly line of defendant Buck's tract above referred to, for a right of way out to the disputed road to the south of the defendant Vermillion's gate, and south of the defendant Vermillion's tract described in the notice above. Part of the consideration of this strip for a right of way was the sale by plaintiff to Buck of about forty acres of land joining Buck's tract at a reduced price. In the deed conveying the strip in question the description runs along the north boundary-line of the said Buck "to the center of a road used by said Buck and others," being the road in dispute, and in the agreement Buck agrees "to pay one half of the cost of bridges along the above-described right of way, and to fence the said right of way on the north side its entire length at his own cost and expense." There was quite a deep creek running southerly east of the road in dispute and between it and the Hartley tract, which it was necessary to bridge in order to make the strip purchased available as a means of reaching the road in dispute, which bridge cost between two hundred and fifty and three hundred dollars.

He further testified that on the east side of the disputed road was a large gate-post which had been standing there for the past ten or twelve years, and that it had been used as a corner-post for the fences. The fence running along the north side of the Thurber road is nailed to it, and the fence on the east side of the disputed road is also nailed to it; and on the west side of the road is also an old gate-post used in a similar manner. These two gate-posts at the entrance to the road in dispute are corner-posts of fences, and are about thirty feet apart, and never interfere with the travel on the disputed road. He says: "I never asked Mr. Buck's or anybody's permission to travel the disputed road at any time whatever; never conversed with anybody with reference to asking permission to travel that road during the whole period of fourteen years over which I have traveled it. I always claimed the right to travel the disputed road the entire fourteen years that I traveled it. I paid about eighteen dollars towards fixing the roadway now in dispute. Before the shaling was done, I rode over the properties of W. H. Buck and I. K. Buck." Defendant Buck, in the fall of 1893, spoke to him of his desires of shaling the road along William Buck's and I. K. Buck's, and asked how much he thought he ought to contribute. "And the upshot of it was I gave him eighteen dollars to assist in putting shale on that bad place." This was not as a consideration for traveling the road, but simply to aid in putting it in repair. "I felt that whenever I traveled that road nobody could stop me." Nothing transpired to the contrary until defendant Buck objected to his hauling, along just before the commencement of the suit in 1899, on account of the dust that his hauling created. The plaintiff testified that the preceding witness, Clement Hartley, was her son, and acted under her authority in the premises, and that he had been her agent attending to her business during the last fourteen or fifteen years. "I never asked permission of Mr. Buck or Mr. Vermillion, or any one else, for myself, or my teams, or my employees, to travel the disputed road. Objection to my teams or employees and agents in traveling the disputed road was never made to me." She testified: "I would never have made the deed with Mr. Buck conveying him that land for the price I did, and accepted the conveyance of the right of way as part of the consideration, if I had not

believed that by getting this right of way I was getting a free, open road all the way to Vacaville from my place." On the part of the defendants, D. K. Corn testified that he had been a supervisor of Solano County for eight years from 1884, and says: "So far as I know, that road has always been traveled by the public generally. I have never known permission being given by the owners of the land over which the road runs to any one. I never asked permission." Also, for the defendants, E. N. Eager, who had been county surveyor of that county, testified that he knew the road, and while making a county map he put the disputed road on the map as a private road. Defendant Buck, who claims the road in question to be a private road, could name but one person, M. R. Miller, whom he stopped from traveling that road prior to the obstruction of the plaintiff, and that was about fourteen years before the trouble with the plaintiff. L. L. Hatch, for the defendants, stated that the line of travel from the county road to his ranch is up through past Mr. Pinkham's, I. K. Buck's, L. W. Buck's, Frank Buck's, through Mr. Chubb's, and then through Mr. Frank Buck's upper place, and through Mr. Vermillion's place; has known the road for twenty-five years. "It has been traveled by teams during all that time, by people who lived there, and by others." He says he did not consider it a public road because it was not a county road; it was not kept up by the county. He says: "I never asked permission of any one to travel the disputed road at all. I suppose so far as Mr. Buck's house it looks pretty near as a public road; looked the same as a public road to me. It has been worked generally by the parties that lived on it." The defendant Vermillion says: "The character of the use of the road, so far as I have known it, from the E. R. Thurber road north, has been, the people that lived along it used it principally. Mr. Buck has a great many hands there, and gets off a great deal of fruit—great many vehicles and wagons, and I suppose as far as Mr. Buck's house it looks pretty near as a public road—looked the same as a public road to me. It has been worked generally by parties that lived on it, parties owning property adjacent to it." He was asked on cross-examination whether he ever stopped any one from passing over the disputed road, and answered: "No; I don't think so myself, unless they passed through my place.

—Q. Now, I will ask you again, is it a fact or not, that every one that desired to make an effort to pass over this disputed road between the Thurber road and the gate at your upper place passed over it without asking permission of any one to do so?—A. Well, I can't call to mind any time that any one was barred out from down there particularly." William Rippey, for the defendant, never heard the road called a public road. F. H. Buckingham, also for the defendant, testified that he was at that time one of the supervisors of the county and road commissioner, and knows the road running across the valley referred to as the Thurber road. He also says he knows the disputed road as far as Mr. Buck's north line, and as far as Mr. Vermillion's south line; no further than that. He says it has always been considered a private road. On cross-examination he explains why he considered it a private road; that it had been a matter of investigation by the board of supervisors, and had not been adopted as a county road. On cross-examination he admits that those who called it a private road included the entire road, beginning at the Thurber road and running through Vermillion's upper place to Pleasant Valley. John Caughy testified that he had charge of defendant Buck's place, and said that Buck paid about two thirds of the expense of keeping the road in dispute in repair, and that it cost from one hundred and fifty to two hundred dollars a year. Defendant Buck testified that he is one of the owners of the land over which the road passes; that he has traveled the road about fifteen years without asking permission from any of the other landowners, and the only one that he can recollect of ever having given permission to pass through his place was Mr. Zimmerman, which was quite recently. He says: "I think Mr. Hartley sold me the land a little cheaper than if he had not obtained this right of way." He was asked on cross-examination: "Would the right of way which you conveyed to the Hartleys have been of any advantage or benefit to them unless they could continue on down over this disputed road to the Thurber road?—A. Probably not, probably not.—Q. You knew all those years that every-

body was traveling that road that had occasion to travel it, did you not?—A. Yes.”

It is contended by defendants' counsel, correctly, that the conveyance of the right of way by defendant Buck through his land to the road in question would not bind the defendant Vermillion; but it must be remembered also that defendant Vermillion did not own a foot of land over which the road passes from his upper place to a point very nearly to the Thurber road, a distance of about a mile. He purchased a narrow strip along the Thurber road on the east side of the road in dispute, as he says, to insure his right of way through to the Thurber or public county road. The evidence shows that the so-called disputed road was laid out or designated by the parties through or across whose land it ran first, and has since been used not only by them but by all others who had occasion to pass that way, and became “dedicated or abandoned to the public” prior to the obstruction placed therein by the defendants in 1899. This constituted it a highway or public road within the terms of the statute, as well as at common law. “In all counties of this state public highways are roads, streets, alleys, lanes, courts, places, trails, and bridges, laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for the partition of real property.” (Pol. Code, sec. 2618.) In *Sherman v. Buick*, 32 Cal. 241,¹ the subject of public and private roads is discussed in the opinion of the court by Justice Sanderson at considerable length, in which he takes occasion to criticise the terminology in certain acts of the legislature on the subject. It is said: “If the legislature provides for the laying out and establishing of a certain class of roads or highways which from any cause, whether for the purposes of classification, or otherwise, is denominated ‘private,’ or as being for the especial benefit of certain individuals upon whom the burden of cost and repair is cast, instead of the public at large, it by no means follows that such roads become the private property or estate of the individuals designated, . . . for where roads are laid out,

¹ 91 Am. Dec. 577.

whether mainly for the accommodation of particular neighborhoods or individuals or not, it must be understood as having been provided for the use of every one who may have occasion to travel it, and hence as being public. In other words, the legislature has no power to lay out and establish private roads in the sense that they are to be the private property of particular individuals, or that they are what are denominated 'private ways' at common law; and hence, so far as they undertake to do so, their action is simply null and void; but the road so laid out and established becomes a way over which all may lawfully pass who have occasion, and therefore public; and the language employed by the legislature, so far as it relates to the legal character of the road—as public or private—must be understood as being used for the purpose of distinguishing it from all other roads, or, in general terms, for the purposes of classification. In accurate legal contemplation the term 'private road' involves a contradiction. The term is unknown to the common law. It has its origin in American legislation. It cannot be regarded as having been employed as a substitute for the word 'way,' as used at common law. . . . For the purpose of distinguishing between such roads and those which subserve equally the interests of all, a name for the former was needed, for the legal term 'highway' was alike applicable to both; hence the terms 'public' and 'private' roads. The latter is not to be understood as being synonymous with 'ways' at common law, but as indicating a particular class of highways or public ways over which any one may pass without committing trespass."

It is a matter of common knowledge that many roads and highways in this state—starting, perhaps, first as mere trails—became public highways without any formal or express dedication, but by long uninterrupted use and general acquiescence. When, as in this case, the public, or such portion of the public as had occasion to use the road, traveled over the same, with full knowledge of the landowners interested, without asking or receiving any permission and without objection from any one, for a period of time beyond that required by law to bar a right of action, a right in the public to the use of the road arises by prescription or

implied dedication. (*Schwerdtle v. County of Placer*, 108 Cal. 589.) In the opinion in that case a large number of authorities are cited to the effect that a dedication is presumed from long and continued adverse use as a road or highway. In this connection it may be remarked that as to the defendant Buck, he is estopped from denying that there was a dedication of the road in question. In *Stone v. Brooks*, 35 Cal. 490, lots were sold as abutting on or extending to Perry Street, "which at that time, so far as actually opened, was but a *cul de sac*," and it was held as a dedication by the seller of the portion of the lot represented as an extension of Perry Street. In the opinion many cases are cited to the same effect. The evidence is clear that Buck sold the strip of land to the plaintiff along his north line for the purpose of a right of way from plaintiff's premises to the road in question as a means of reaching a public highway.

Cooper v. Monterey County, 104 Cal. 438, relied upon by appellants, is altogether different from the case at bar. There it was said the language of the finding did not negative the idea that the use might have been under a mere license. Here the finding is, that for more than ten years last past there has existed, and now continues to exist, a public road and highway in Vaca Valley, from the public road known as the E. R. Thurber road to the land of defendant Vermillion, and that for more than ten years last past before the commencement of this suit the plaintiff has, with the general public, used the said road and highway as a public road and highway, without let or hindrance of any kind, until the erection by the defendant of the gate upon the third of August, 1899. These findings expressly negative the presumption that the use of the road was by license or permission, but, on the contrary, as a matter of right and without permission of any one, and we think the findings of the court are abundantly sustained by the evidence.

The judgment and order are affirmed.

Shaw, J., McFarland, J., Lorigan, J., Beatty, C. J., and Henshaw, J., concurred.

[S. F. No. 3526. In Bank.—December 19, 1903.]

In the Matter of the Estate of CHARLES R. POTTER, Deceased.

ESTATES OF DECEASED PERSONS—PETITION TO ENFORCE CONVEYANCE OF LAND—DISMISSAL—AMENDMENT *NUNC PRO TUNC*—COSTS—APPEAL.—Where a petition to enforce a contract for the conveyance of land of a deceased person was contested by the administrator, and was dismissed without prejudice, under section 1602 of the Code of Civil Procedure, and several months thereafter the administrator moved for and obtained an amendment to the judgment *nunc pro tunc*, taxing the costs against the petitioner, the petitioner is entitled to appeal from the judgment so amended within sixty days from the date of the amendment, upon a bill of exceptions prepared and served thereafter in due time.

MOTION to dismiss an appeal from orders of the Superior Court of Sonoma County amending and modifying a judgment of that court *nunc pro tunc*. Emmett Seawell, Judge.

The facts are stated in the opinion of the court.

Haskell & Denny, and J. T. Campbell, for Appellant.

Lyman Green, and F. A. Meyer, for Respondent.

THE COURT.—This is a motion to dismiss the appeals from sundry orders taken by appellants under the following circumstances: A petition was filed by the appellants in the matter of the estate of the deceased, seeking specific performance of a contract for the sale and conveyance of land, made by deceased with them. The proceedings were under sections 1597 and 1598 of the Code of Civil Procedure. The administrator made answer, controverting the alleged right to compel conveyance, and concluded by a prayer that the petitioners take nothing by their petition. After hearing, the court dismissed the petition without prejudice, as contemplated by section 1602 of the Code of Civil Procedure. The decree was entered accordingly. This decree was given upon the eleventh day of June, 1902. Some months thereafter the administrator filed his "notice of a motion for judgment *nunc pro tunc*,"

by which he proposed to ask the court to amend its judgment by adding thereto a judgment for costs against the petitioners, stating that the motion would be made upon the ground "that said administrator inadvertently failed on said eleventh day of June, to ask for said judgment, and upon the ground that said court at any time has the right to enter said judgment." The court did order its judgment amended *nunc pro tunc*, and taxed the costs against the petitioners in the sum of one hundred and fifty-eight dollars. From this judgment, as amended, they appeal. Various other orders were made by the court, and a contention arises between the parties as to whether or not these orders are appealable. But without entering into a minute examination and discussion of them, it is sufficient here to say that, giving fullest weight to the action of the trial court in the premises, it amounted to a modification and amendment of its judgment. From the judgment so amended and modified an appeal taken within sixty days will lie. (*Estate of Corwin*, 61 Cal. 160; *Stuttmeister v. Superior Court*, 71 Cal. 322.) It is further urged that there is no proper bill of exceptions to support the appeal, but the certificate of the judge shows that the bill of exceptions was prepared and served in time.

The motion to dismiss is therefore denied.

[Sac. No. 988. Department Two.—December 21, 1903.]

GEORGE W. LINDY, Plaintiff-Respondent, v. MARTHA McCHESNEY et al., Defendants-Respondents, and MARY E. MANN, Defendant-Appellant.

ESTATES OF DECEASED PERSONS—PROCEEDING TO DETERMINE HEIRSHIP—COSTS—DEPOSITIONS NOT USED.—In a proceeding to determine heirship of the estate of a deceased person, where the plaintiff and one of the defendants each claimed the entire estate as against all other claimants, as sole child and heir, and the judgment was in favor of the other defendants, who were devisees and legatees under the will of the decedent, a judgment in their favor for costs was proper, and such judgment might properly include the costs of depositions

taken by them, though not used at the trial, in the absence of a showing that it was unnecessary to take them, or that they should not be allowed for some special reason.

ID.—DISCRETION OF COURT—APPORTIONMENT OF COSTS.—The court has discretion in a proceeding to determine heirship, under section 1664 of the Code of Civil Procedure, to apportion the costs between the parties; but it is proper to award costs to the successful claimants, as against an unsuccessful adverse claimant of the whole estate.

APPEAL from an order of the Superior Court of San Joaquin County denying a motion to retax and apportion costs. Edward I. Jones, Judge.

Woods & Levinsky, and James H. Budd, for Appellant.

Denson, Oatman & Denson, for Plaintiff-Respondent.

John A. Percy, and Budd & Thompson, for Martha E. McChesney et al., Respondents.

James A. Louttit, and Louttit & Middlecoff, for William A. Cowdery, Respondent.

H. R. McNoble, for Rosa B. Hunt, Respondent.

E. O. Larkins, for Henry West et al., Respondents.

Carl E. Linds, for Mary E. Humes, Respondent.

Gould & Bogue, for Philander N. West et al., Respondents.

McFARLAND, J.—This is a proceeding under section 1664 of the Code of Civil Procedure, to ascertain and declare the rights of all persons claiming as distributees of the estate of George M. Kasson, deceased. The appeal here is by Mary E. Mann from an order denying her motion to strike out from a bill of costs filed by the respondents certain charges for taking depositions, which were not used at the trial, and “to apportion the costs” in the proceeding “in accordance with the provisions” of said section 1664.

The record on the present appeal is very meager, and shows nothing as to the nature of the respective claims of the parties to the estate of said Kasson. It merely shows

that the judgment was in favor of the defendants who are respondents here, and against the appellant, Mann. The case, however, was here once before, and is reported in *Estate of Kasson*, 127 Cal. 496, and counsel for both parties refer in their briefs to the case as there reported. If we can look into that case, we see that the appellant, Mann, claimed the entire estate as the child and sole heir of the deceased, and that the respondents claim as devisees and legatees under a will made by said Kasson, so that the contest was between appellant on the one side, and the respondents on the other; and as appellant lost, there is no reason why she should not be liable for the costs, as any other losing party in a civil action. It is true that section 1664 gives the court discretion to apportion the costs between the parties, but—if we can look into the former record—the present case does not call for such action. On the other hand, if we are confined to the record on the present appeal, there is nothing in it to show any abuse of discretion. As to the items for taking depositions, they are proper disbursements to put into a cost-bill, unless it be shown that they were unnecessary, or that for some special reason they should not be allowed,—which is not shown here. It is frequently proper and necessary for a party to have depositions taken, although afterwards the case may take such course as to make it unnecessary to use them. For instance, the opposite party may fail to make out a case, or a nonsuit may be granted, in which case the party taking the depositions would not be called upon to use them.

The order appealed from is affirmed.

Lorigan, J., and Henshaw, J., concurred.

[S. F. No. 3669. In Bank.—December 21, 1903.]

**SAN FRANCISCO LAW AND COLLECTION COMPANY,
Respondent, v. STATE OF CALIFORNIA, Appellant.**

ACTION AGAINST STATE—BOUNTY ON COYOTE SCALPS—NEW TRIAL.—The provisions of the Code of Civil Procedure relative to new trials apply to actions against the state to recover the bounty on coyote scalps brought under the act of March 23, 1901. The action authorized by that act is not a special proceeding, but an ordinary action for money due, and the rules of law apply thereto which are applicable to ordinary actions.

ID.—APPEAL—TIME FOR FILING TRANSCRIPT—SETTLEMENT OF EXCEPTIONS.—In an action in which a motion for a new trial will lie, the appellant has forty days after the settlement of a bill of exceptions on motion for new trial, which may be used on appeal from the judgment, in which to file his transcript on appeal; and where it appears that the time has not elapsed, and the settlement has been deferred by stipulation of the parties, a motion to dismiss the appeal on the ground that the transcript has not been filed must be denied.

ID.—APPEAL BY STATE—UNDERTAKING—CONSTRUCTION OF CODE.—Although section 1058 of the Code of Civil Procedure in terms only exempts the state from giving an undertaking on appeal when it is a party plaintiff, and does not expressly exempt it when it is a party defendant, yet, from the other terms of that section, the intention to exempt the state in all cases is clear; and where the provisions of the Code of Civil Procedure relating to undertakings on appeal, as originally passed and as last amended, were not intended to include the state, the general words of such provisions should not be held applicable to the state, unless the intention of the legislature that they should be applicable is clearly shown.

ID.—SERVICES OF NOTICE OF APPEAL—TIME FOR FILING.—The service of a notice of appeal may precede the filing of it, and the statute does not prescribe any particular time after service within which it must be filed, and it may be filed at any time before the expiration of the time for appeal, though, when an undertaking is required, it must be filed within five days after service of the notice.

MOTION to dismiss an appeal from a judgment of the Superior Court of Sacramento County. Joseph W. Hughes, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, George A. Sturtevant, Assistant Attorney-General, and Devlin & Devlin, for Appellant.

T. Carl Spelling, for Respondent.

ANGELLOTTI, J.—This is a motion to dismiss an appeal from a judgment entered against defendant in the superior court of Sacramento County, for the sum of \$8,885. The action was brought under the provisions of the act of March 23, 1901, (Stats. 1901, p. 646,) authorizing suits against the state on claims arising under the act fixing a bounty on coyote scalps, approved March 31, 1891. The motion to dismiss the appeal is based on several grounds, which will be separately considered.

1. It is urged that the appellant has failed to serve or file a transcript on appeal within the time prescribed by the rules of this court. The notice of appeal was served on April 17, 1903, and filed on April 28, 1903, and no transcript on appeal had been served or filed at the time of the serving of the notice of motion to dismiss the appeal, July 23, 1903, or at the date of the hearing of the motion, August 3, 1903. It appears, however, that a notice of intention to move for a new trial upon a bill of exceptions was regularly given; that thereafter a proposed bill of exceptions was regularly and in due time served on respondent; that, by stipulation, the hearing and settlement of said bill was continued to September 1, 1903, until which time respondent was given to prepare amendments; and that the bill of exceptions has not been settled. If the action be one in which a motion for a new trial will lie, it is clear that the fact that the bill of exceptions to be used on the hearing of the pending motion for a new trial, and which may be used on this appeal from the judgment, has not yet been settled, and that its settlement has been deferred by stipulation of the parties, is a complete answer to the motion to dismiss on the ground that the transcript on appeal has not been filed. The appellant has forty days after the settlement of said bill within which to file such transcript. (*Kelly v. Ning Yung etc., Admr.*, 138 Cal. 602; *Bernard v. Sloan*, 138 Cal. 746.)

It is claimed that the trial court has no authority to grant a new trial in a proceeding under the act of March 31, 1901;

that there is consequently no authority for the settlement of a bill of exceptions on a motion for a new trial in such a proceeding; that such a bill cannot be used on the appeal from the judgment; and that the fact that it is still unsettled is therefore no answer to the motion to dismiss. The argument is undoubtedly sound, if there be no authority for the granting of a new trial in such proceedings.

We are, however, satisfied that a motion for a new trial will lie in such a proceeding. The action authorized by the act of 1901 is an ordinary action for the recovery of money alleged to be due from the state, and is in no true sense of the word a special proceeding. The fact that no action can be maintained against the state without its express permission is immaterial. When such permission is granted by statute for the maintenance of suits against the state by those who claim that the state is indebted to them, there is no material distinction between the proceeding instituted thereunder and any action for money against an ordinary defendant, and the rules of law applicable to the ordinary action are applicable to such suit, except in so far as it is prescribed otherwise by the legislature. The act provides for a "suit" in any superior court of the state and the prosecution of the same to "final judgment." It declares that "The rules of practice in civil cases shall apply to such suits, except as herein otherwise provided, with the right to appeal to either party." There is no special provision therein relative to the pleadings and mode of trial. The issues of fact made by the complaint and answer in the ordinary way are to be tried and determined in the ordinary way, and there is nothing in the language of the act to indicate an intention to deprive either the plaintiff or the state of the right accorded to parties to an action to apply for a re-examination of the issues of fact for the causes specified in section 657 of the Code of Civil Procedure, unless the words "with the right of appeal to either party" indicate such intention.

We are satisfied that they indicate no such intention, and that the provisions of the Code of Civil Procedure relative to new trials are applicable to suits against the state under the act of March 23, 1901.

2. It is claimed that the appeal is ineffectual for any purpose, by reason of the fact that no undertaking on appeal for

damages and costs has ever been filed by the state, or deposit of money made in lieu thereof, and that the giving of such undertaking has not been waived. (Code Civ. Proc., secs. 940, 941.)

This claim is based upon the fact that section 1058 of the Code of Civil Procedure does not in terms exempt the state from giving undertakings when it is a party *defendant*, although the section does in terms so except the state when it is a party plaintiff, and exempts any state officer, when, *in his official capacity or in behalf of the state*, he is a party plaintiff or defendant. The intention to dispense with the bond in all cases where the state or the people of the state, or any state officer in behalf of the state, or any county, city and county, city, or town is a party plaintiff or defendant, is clear, and the reason for the omission from section 1058 of the Code of Civil Procedure of any provision in terms exempting the state from the giving of bonds and undertakings in actions wherein it is a party defendant was probably, as suggested by plaintiff, that at the time of the last amendment of said section the state could not be brought into court as a defendant. The general provisions relative to the giving of an undertaking on appeal as security for damages and costs (sections 940 and 941 of the Code of Civil Procedure) have not been amended since the year 1874. As originally enacted, and as last amended, they were not intended to include the state, for by section 1058 of the Code of Civil Procedure, as originally enacted in 1872, explicit provision was made for the exemption of the state from the effect of such provisions in all cases in which it could then be made a party.

This being the condition of the legislation at the time of the enactment of the various provisions authorizing suits against the state on claims for money, the general words of the statutory provisions relative to undertakings on appeal should not be held applicable to the state, unless the intention of the legislature that they should be so applicable is clearly shown. (See 20 Ency. Plead. and Prac., 588; *Ex parte Macdonald*, 76 Ala. 603; *State of Nevada v. Rhoades*, 6 Nev. 373.) No such intention anywhere appears. No one can conceive of any reason why the state should be compelled to give an undertaking on appeal in a proceeding under this act. Such an undertaking is given by an appellant to secure to the respond-

ent the costs on appeal and such damages as may be awarded thereon. Under the express terms of the act authorizing the suit, all costs must be paid by the plaintiff, and any judgment that it may ultimately recover can be only for the amount actually due plaintiff, without interest and without costs. It is suggested that damages might be awarded plaintiff against the state for a frivolous appeal taken by its officers, but the suggestion is probably not seriously made. Such an undertaking on appeal could serve no useful purpose. The right of appeal in these proceedings is guaranteed to the state by the act, but there is no provision for the giving of an undertaking on appeal by the state, and we know of no way in which, in the absence of legislation providing a mode therefor, the state could comply with the requirements of the general law relative to the giving of such an undertaking, or security in lieu thereof. To hold that the giving of the same is necessary to perfect an appeal by the state would be practically to deny the state the right of appeal in these cases. (See *Commonwealth v. Franklin Canal Co.*, 21 Pa. St. 117.)

3. It is further urged that no notice of appeal was served in proper time, or at all. As already stated, the notice of appeal was not filed until eleven days after the service of the same, but it was filed within six months of the date of entry of judgment. Section 940 of the Code of Civil Procedure provides that "An appeal is taken by filing with the clerk of the court . . . a notice stating the appeal from the same, . . . and serving a similar notice on the adverse party or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal, an undertaking be filed," etc.

It is well settled that under this section the serving of the notice of appeal may precede the filing, and, as was said in *Robinson v. Lodge*, 114 Cal. 41, "The code does not prescribe any particular time after service within which it must be filed." In that case the service preceded the filing by five days. In both *Noonan v. Nunan*, 76 Cal. 44, and *Galloway v. Rouse*, 63 Cal. 280, the service preceded the filing by a day or more, while in *Hewes v. Carville Mfg. Co.*, 62 Cal. 516, the service of the notice preceded the filing by eighteen days. In all these cases, the motion to dismiss the appeal was denied.

We have not found that the doctrine of *Hewes v. Carville Mfg. Co.*, 62 Cal. 516, has been overruled so far as the question here involved is concerned. The cases relied upon by plaintiff as overruling it are cases relating entirely to the undertaking on appeal, which, to be valid, must be filed within five days after the *service* of the notice of appeal. When it is once conceded, as it must be under the decisions, that the filing of the notice may be on a day subsequent to the service, and that the code does not prescribe any particular time after service within which such filing must be had, it logically follows that the notice may be filed any time before the expiration of the time for appeal. The appeal is not perfected until all of the things required by the statute to be done have been done. The notice of appeal must be served, the undertaking must be filed within five days after the *service* of the notice, and the notice must be filed. So long as the notice of appeal remains unfiled, the appeal has not been taken, and the prevailing party is at liberty to proceed, notwithstanding the service of notice and the filing of undertaking, to enforce his judgment, so that the claim of plaintiff that the losing party may, by failing to file his notice of appeal after notice, "tie up the judgment for six months without ever appealing," is not well founded. The notice of appeal must undoubtedly be both served and filed within the time allowed for the taking of an appeal, but we find no warrant in the statute for holding that the notice must be filed within any specified number of days after service.

The motion to dismiss the appeal is denied.

Beatty, C. J., Shaw, J., Van Dyke, J., Henshaw, J., and Lorigan, J., concurred.

[Sac. No. 874. In Bank.—December 21, 1903.]

COUNTY OF YUBA, Respondent, v. KATE HAYES MINING COMPANY et al., Appellants.

INJUNCTION—MINING DEBRIS—NUISANCE—ACTION BY COUNTY.—A county, as the owner of property injured by the deposit of mining debris in a tributary of the Yuba River, may maintain an action to enjoin the deposit therein of such debris by a mining company engaged in sluice-mining upon such tributary. The public nuisance in such case is also a private nuisance to the county, which it may enjoin.

ID.—SITUATION OF COUNTY PROPERTY “ADJACENT” TO RIVER—PLEADING—FINDING—SUFFICIENCY OF EVIDENCE.—Where the complaint alleged and the court found that the county property was “adjacent” to the Yuba River, the finding is not against the evidence, where the evidence shows that the property, though not in contact with the river, was sufficiently near thereto to be injured by the deposit of debris thereon by the river in time of high water. The property is “adjacent” to the river when situated near or close to it.

ID.—RELIEF BEYOND ISSUES—INVASION OF PROPERTY RIGHTS.—Where the issues tried and determined related solely to the working of defendant's mine by the hydraulic or sluicing process, so as to deposit debris in a tributary of the river, relief granted beyond the issues, to restrict the use of the water of the defendants on any other ground or mine, or forbidding a *bona fide sale or transfer* of the water supply or of the mining property of the defendants, which may be used for any lawful purpose, even though defendants may know that the purchaser will not, in working the same, respect the rights of others, if the sale is not made for that express purpose, is an unwarranted invasion of the rights of property of the defendants.

APPEAL from a judgment of the Superior Court of Yuba County and from an order denying a new trial. E. A. Davis, Judge.

The facts are stated in the opinion of the court.

C. W. Cross, for Appellants.

The judgment grants relief not authorized by the pleading, and not embraced within the issues, and is erroneous. (Code Civ. Proc., sec. 580; *Sterling v. Hanson*, 1 Cal. 478; *Sigourney v. Zellerbach*, 55 Cal. 431; *Northern Railway Co. v. Jordan*, 87 Cal. 23; *Mondran v. Gouz*, 51 Cal. 151; *Backman v.*

Sepulveda, 39 Cal. 688; *Hicks v. Murray*, 43 Cal. 515; *Reed v. Norton*, 99 Cal. 617; *Cummings v. Cummings*, 75 Cal. 434.) The remedy on a judgment broader than the facts alleged and found is by an appeal from the judgment on the judgment-roll. (*Shepard v. McNeil*, 38 Cal. 72; *Heinlen v. Heilbron*, 71 Cal. 557; *Roberts v. Eldred*, 73 Cal. 394.)

E. P. McDaniel, and Robert T. Devlin, for Respondent.

The only limitation on the power of a court of equity to grant relief under the general prayer for relief is, that it must be agreeable to the case made by the bill, and not different from or inconsistent with it. (*Cram v. Barnes*, 1 Md. Ch. 151.) Any appropriate relief may be granted under a general prayer. (*Replier v. Buck*, 44 Ky. (5 B. Mon.) 96.) The relief granted is appropriate under the general prayer for relief, and is not inconsistent with the complaint.

ANGELLOTTI, J.—This action was brought by the plaintiff, the owner of certain lots of land in the city of Marysville, county of Yuba, in which are situated the county courthouse, county jail, hall of records, and county hospital, and also the owner of the wagon-bridge crossing the Yuba River from the foot of D Street in said city, to obtain a decree enjoining defendants from discharging debris from their mineral lands into Sweetland Creek and the Yuba River, or any branch thereof, to the injury of plaintiff's said property. On the trial, the action was dismissed as to all of the defendants except the above-named mining company and Charles N. Miller, its superintendent, and judgment went for plaintiff. From the judgment and order denying their motion for a new trial said defendants appeal.

The complaint alleged that the property of plaintiff is adjacent to the Yuba River, which empties into the Feather River at or near the city of Marysville, and that the defendants are in possession of, working and operating by the hydraulic process and the ground-sluice process, certain mines and mining claims in Nevada County, and discharging the debris therefrom into Sweetland Creek, a tributary of Yuba River, about three miles in length, whence said debris is carried down the Yuba River, and is deposited and lodged in the beds

and channels of the river and upon plaintiff's property, and will continue to do so, unless restrained. The complaint alleged the general effect of such mining operations of defendants upon the Yuba River, which is by the deposit of debris therein, to raise the bed and channel of the river, and cause the lands on each side thereof, in times of flood, in the absence of high and secure levees, to be covered with water and debris, to the great damage of said lands. (As to the general effects of such mining operations, see *Mining Debris case*, 9 Saw. 441, 18 Fed. 753, relating to the same locality.)

It was further alleged that it will require many years to exhaust the mines of defendants, that the property of plaintiff is, by reason of said mining operations of defendants, each year becoming more seriously threatened with destruction from the waters of the river, that its value has already been greatly depreciated thereby, and that if said defendants and others who are engaged in said operation are permitted to continue to engage therein, the said property will be utterly destroyed and rendered absolutely valueless for any purpose whatever. It was further alleged that plaintiff's lands have been flooded, but there was no evidence to sustain this allegation, the testimony in this regard being simply that but for the levees it would have been ruined. In all other respects, the material allegations of the complaint must be held to be sustained by the testimony. It is true that the evidence failed to show that defendants were mining by the "hydraulic process," but, admittedly, they were mining by the "ground-sluice process," which, according to the evidence, produced the same effect in kind as the hydraulic process, only to a less degree. It is urged that the property of plaintiff, other than the bridge, was not "adjacent to" the Yuba River, and that the finding of the court in that regard is not sustained by the evidence. The property is all near the river, but none of it borders thereon. To be "adjacent" to the river, it is not essential that the property should be in actual contact therewith. A thing is adjacent to another when it lies near or close to it, although it is not in actual contact therewith.

The material question here was whether it was near enough to the river to be damaged by such overflow thereof as might be caused by the acts complained of.

The court was justified in concluding that the operations of defendants constituted a public nuisance, specially injurious to plaintiff as a property-owner, and, therefore, one to enjoin which plaintiff could maintain an action. (Code Civ. Proc., sec. 731; Civ. Code, sec. 3493; *Mining Debris case*, 9 Saw. 441; 18 Fed. 753.) As to the county, as a property-owner, the nuisance is also a private nuisance. (*Fisher v. Zumwalt*, 128 Cal. 493.) The county is not suing to protect the rights of others, but purely in its proprietary capacity, as the owner of certain real property.

The decree enjoining defendants, their officers, agents, etc., from discharging the debris into Sweetland Creek or Yuba River, or any of their tributaries; and from dumping or placing the same in such places that it would be liable to be washed or removed thereto, and from suffering or allowing its or their claims to be worked or operated by the hydraulic process or ground-slucice process, and the debris therefrom discharged into said river, creek, or tributaries thereof, was warranted by the pleadings, evidence, and findings. The decree further restrains defendants "from suffering others to use his or its water supply, or any part thereof, for the purpose of washing into such streams or gulches any earth, rocks, boulders, clay, sand, or other solid material contained in *any other ground or mine*, with knowledge on the part of said defendants that the same is to be used in such a manner as to work injury to the property of the plaintiff described in the complaint, . . . and also from selling, leasing, or in any manner conveying, transferring, or disposing of said mine and mining ground, or any part thereof, or the water supply of the said defendants, or either of them, to any person whatever for the purpose of being worked or used by the hydraulic process or the ground-slucice process, and the mining debris discharged therefrom into said creek or river, or any of their or its tributaries, with knowledge of said purposes on the part of said defendants.

It is specially urged by appellants that the judgment should be modified by striking therefrom these portions thereof, it being claimed that neither the allegations of the complaint nor the evidence justified the insertion thereof in the decree. While the prayer of the complaint asked for this relief, there was no allegation of the complaint warranting the provision

as to the use of defendants' water "*in any other ground or mine.*" The object of the action was to restrain the defendants from working *their own mining property* in a certain way; the allegations of the complaint are clearly confined thereto, and so far as the complaint is concerned the water is referred to merely as an instrumentality in working said property. There is no allegation that they ever suffered or threatened to suffer any one else to use their water for mining operations. On the contrary, the allegation as to the water is, that the defendant mining company "is now using and will continue to use" the same "to mine *its* said tracts of land," and the only evidence in the record is that furnished by the stipulation "that the company defendant owns and controls a water supply of 2,500 inches and ditches to convey the same to the mine and to such customers as may purchase water when it has no use for it." There was no issue as to any of these matters and no finding of the court. While the court was authorized to fully protect plaintiff against any threatened acts and injuries *complained of*, it could not grant any relief except such as was "consistent with the case *made by the complaint and embraced within the issue.*" (Code Civ. Proc., sec. 580.) The case made by the complaint in this proceeding related solely to the mining operations of defendants on their own lands. Other portions of the decree will restrain defendants from allowing or suffering others to use the water to plaintiff's injury in maintaining operations *on said land*, and beyond this the court was not authorized by the pleadings to go, for the matter was not embraced within the issues. The object of that portion of the decree prohibiting the selling, leasing, conveying, transferring, or disposing of the mine, mining ground, and water supply of defendants, so far as justified by the pleadings and the law, is fully attained by other portions thereof. What plaintiff seeks to prevent by this is the discharge of mining debris from defendants' lands into the creek and river, and their tributaries, by persons to whom the property may be transferred by the defendants. By another provision of the decree, as already shown, defendants are prohibited from suffering or allowing their claim to be worked or operated by the hydraulic process or ground-sluice process, and the debris therefrom discharged into said river, creek, or tributaries thereof, and there can be no doubt that defend-

ants would be liable thereunder for the doing of the prohibited acts by those to whom the property is leased by defendants for the purpose of being so worked and operated. It may also be that any disposition by the defendants of the property to another, by deed or otherwise, *for the express purpose of being so worked or used*, would, if such prohibited acts were done by the person to whom the transfer was made, be a violation of that portion of the decree which prohibits the defendants from doing the acts productive of injury, or from aiding others in the commission thereof. But this portion of the decree is open to the construction of forbidding an absolute *bona fide* sale or transfer by defendants of their mining property, which may be put to a lawful and proper use, to any person who may have the intention to work or use the same by the hydraulic process or ground-sluice process and discharge the debris therefrom into the river, creek, or tributaries thereof, if defendants have knowledge of such intention on the part of the purchaser. We have not been cited to any authority warranting such an interference with the rights of property, and know of no principle upon which it can be held that a man may not sell his mine simply because he may know that the purchaser will not, in working the same, respect the rights of others.

The order denying defendants' motion for a new trial is affirmed, and the cause is remanded to the lower court, with directions to modify the judgment by striking out the parts thereof quoted in this opinion,—viz., the part relating to the use of defendants' water supply on other lands than those of defendants, and the part relating to the selling, etc., of defendants' mine, etc.,—and as so modified said judgment will stand affirmed.

Van Dyke, J., McFarland, J., Lorigan, J., Shaw, J., and Henshaw, J., concurred.

[Sec. No. 1012. In Bank.—December 21, 1903.]

In the Matter of the Estate of MARY E. RYDER, Deceased.
L. RYDER, Appellant, v. MARY MOORE, Respondent.

ESTATES OF DECEASED PERSONS—DISTRIBUTION—JURISDICTION—CONVEYANCE BY HEIR-APPARENT.—The jurisdiction of the superior court over the estates of deceased persons is entirely statutory; and whatever power it may have in the matter of the distribution of an estate of a deceased person to consider and determine the rights of the grantees of heirs, legatees, or devisees, under conveyances made by them after the death of the decedent, rests solely upon the provisions of section 1678 of the Code of Civil Procedure, and is limited by the terms of said section. The court has no jurisdiction to determine the right of the grantee of an heir-apparent under a deed made prior to the death of the decedent, or to distribute the estate to such grantee, against the objection of the grantor, who is the sole heir of the decedent.

ID.—VOID BARGAIN-AND-SALE DEED—SUBSEQUENTLY ACQUIRED TITLE.—A bargain-and-sale deed by an heir-apparent prior to the death of the person of whose estate he may become the heir is legally void for want of any interest then to be conveyed, and the effect of the deed to convey the subsequently acquired title of the grantor cannot authorize the grantee to claim distribution of the estate against the objection of the heir. Distribution of the estate of the decedent must be made to the heir who insists thereupon, leaving the question of the effect of the deed upon the after-acquired title of the heir, under section 1106 of the Civil Code, to be asserted in a proper proceeding. The determination of questions relative thereto is not within the scope of the probate proceedings, and is not authorized by statute.

APPEAL from a decree of distribution of the Superior Court of Yolo County. E. E. Gaddis, Judge.

The facts are stated in the opinion of the court.

R. Clark, and G. Clark, for Appellant.

The conveyance of the expectancy of an heir-apparent without the consent of the ancestor is void. (Civ. Code, secs. 700, 1045; *McClure v. Raben*, 133 Ind. 507;¹ *Alves v. Schlesinger*, 91 Ky. 290; *Boynton v. Hubbard*, 7 Mass. 112; *Curtis v. Curtis*, 40 Me. 24.²) It did not convey a future inherited interest. (*McCall v. Hampton*, 98 Ky. 166.³)

¹ 36 Am. St. Rep. 558.

² 56 Am. St. Rep. 335.

³ 36 Am. Dec. 651.

Byron Ball, for Respondent.

The bargain-and-sale deed conveyed the after-acquired title of the grantor, from whatever source derived. (Civ. Code, secs. 1069, 1106; 3 Washburn on Real Property, 3d ed., sec. 35; *Hawkins v. Hawkins*, 50 Cal. 558; *Nunnally v. White*, 3 Met. (Ky.) 589; *Clarke v. Baker*, 14 Cal. 630, 634;¹ *Sherman v. McCarthy*, 57 Cal. 514, 515; *Stewart v. Powers*, 98 Cal. 518; *Green v. Green*, 103 Cal. 110; *Merrill v. Clark*, 103 Cal. 367.)

ANGELLOTTI, J.—This is an appeal by L. Ryder, the father and sole heir of Mary E. Ryder, deceased, from the decree of distribution made in the matter of her estate, distributing all of the property of the estate to one Mary Moore, and also from an order denying his motion for a new trial in the matter of said distribution.

It appears that the deceased died intestate on June 23, 1900, leaving her surviving her said father, the appellant, her only heir at law. Her estate consisted of an undivided one half of a parcel of land in Yolo County, which she had acquired in the year 1876 by inheritance from her mother, Emergene Ryder, wife of appellant.

Appellant was regularly appointed administrator of the estate of his deceased daughter, and in due time presented his final account as such administrator, together with a petition for the final distribution of the said undivided one half of said realty, constituting the whole of the residue of the estate, to himself, as the sole heir of deceased. The respondent, Mary Moore, thereupon filed her opposition to the distribution of said realty to appellant, and asked that the same be distributed to her, the sole ground of her claim being, as shown by the allegations of her opposition, that in the year 1883, seventeen years before the death of deceased, the appellant, who as a distributee of said Emergene Ryder was then the owner of the other undivided one half of said realty, had, for a valuable consideration and by a deed of grant, bargain, and sale, purported to convey the whole of said parcel of land to her, and that she had not thereafter ever parted with the title so attempted to be conveyed to her.

Appellant answered said opposition, alleging that the deed

¹ 76 Am. Dec. 445.

made by him to said Mary Moore was made through inadvertence and mistake, said mistake consisting in "the description in said deed being made to convey five acres of land when it was the intent of the grantor to convey two and one half acres of land and no more." The court did not make any finding upon the question of mistake, but, finding that the deed was executed by appellant as hereinbefore stated, decreed distribution to said Mary Moore.

The allegation as to mistake contained in the so-called answer to the opposition was insufficient in several respects, but it was treated as sufficient by respondent, who amended her opposition to meet the same, by denying "that the same or any part thereof was or is a mistake in any particular whatever, or that it does not clearly and explicitly state the contract and understanding of the parties thereto at the time of its execution and delivery, of which it bears date." The hearing proceeded upon the theory that issue had been made upon the question of mistake, each party introducing evidence thereon. It sufficiently appears from the record that appellant objected to the distribution being made to respondent, upon the ground that it was not the intention and understanding of both parties that the deed should convey anything except the undivided one half of the property that appellant then owned, and that the words purporting to convey more were inserted by mistake.

It is urged that, under these circumstances, the superior court had no right in this proceeding to determine as to the merits of respondent's claim, and to decree distribution to her, and we are of the opinion that this contention must be sustained. Notwithstanding the general jurisdiction of the superior court, proceedings in probate are entirely statutory, and the court exercises therein a special and limited jurisdiction, in the sense that its jurisdiction is limited by the mode and procedure prescribed by the statute. It is well settled that in the exercise of its probate jurisdiction it is not authorized, in the absence of express statutory authority, to decide controversies not strictly within the probate proceedings. (See *Toland v. Earl*, 129 Cal. 155;¹ *More v. More*, 133 Cal. 489, 496; *Martinovich v. Marsicano*, 137 Cal. 354-356.)

¹ 79 Am. St. Rep. 100.

Its function therein is to administer the estate of the deceased and distribute the residue of his property *among those who are entitled to the same under any will properly executed, or under the laws of succession, if the deceased died intestate.* If it were not for section 1678 of the Code of Civil Procedure, the only questions on distribution would be as to who were the heirs, legatees, and devisees, and what property they were entitled to as such, and the court would be without authority to distribute to any persons other than heirs, legatees, or devisees, for that section is the only provision of our law that authorizes distribution to any other person. (*Estate of Crooks*, 125 Cal. 459; *Martinovich v. Marsicano*, 137 Cal. 354.) The said section provides as follows, viz.: "Partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees."

The opinions of this court are not entirely harmonious as to the authority of the court on distribution to determine, against the objection of an heir, legatee, or devisee, as to the rights of a third person claiming under a conveyance alleged to have been made by such devisee, legatee or heir. (*Freeman v. Rahm*, 58 Cal. 111; *Chever v. Ching Hong Poy*, 62 Cal. 71; *Estate of Vaughn*, 92 Cal. 193; *William Hill Co. v. Lawlor*, 116 Cal. 359; *More v. More*, 133 Cal. 489; *Estate of Crooks*, 125 Cal. 459; *Martinovich v. Marsicano*, 137 Cal. 354.) It may, however, be conceded, solely for the purposes of this case, that under the provisions of section 1678 of the Code of Civil Procedure, the court on distribution may determine disputes between heirs, legatees, or devisees, and persons claiming to be the grantees of their shares under conveyances made by them, although the determination of such disputes would not ordinarily be within the functions of the probate court. If such authority exists, it rests solely upon the provisions of the section, and is limited by its terms. (*Martinovich v. Marsicano*, 137 Cal. 354.) But this section includes only conveyances of their shares made by "*heirs, legatees, or devisees*," and has no reference to conveyances

made prior to the death of the deceased, by persons who were not at the time of the conveyance either heirs, legatees, or devisees, and who then had no interest in the property that was capable of being conveyed. (Civ. Code, secs. 700, 1045; *Estate of Garcelon*, 104 Cal. 584;¹ *Estate of Wickersham*, 138 Cal. 355, 361.) In the *Estate of Wickersham*, speaking of an attempted conveyance by an heir-apparent, this court said: "It was legally void; nor could it operate to transfer to the grantee, upon the death of Mrs. Wickersham (the wife of said I. G. Wickersham), the legal interest of the grantor in her estate. He therefore still remained the legal owner of that interest." While such a contract of an heir-apparent may in some cases be enforced in equity as an agreement to convey, or by way of estoppel, it is not a conveyance of the legal title, and is not within the letter or spirit of section 1678 of the Code of Civil Procedure. What was said in the opinion in *Estate of Wickersham*, 138 Cal. 355, as to the power of the court having jurisdiction of the estate of Mrs. Wickersham to determine all questions as to the enforcement in equity of the contract there involved, was *obiter dictum*, for the only question there was as to the power of the court dealing with the estate of I. G. Wickersham.

Respondent relies on section 1634 of the Code of Civil Procedure, contained in the chapter relating to "accounts," which provides that if a petition for final distribution be filed with the final account, the notices posted must so state, and in such case, "on the settlement of said account, distribution and partition of the estate to *all entitled thereto* may be immediately had, without further notice or proceedings." This section in no degree enlarges the scope of the inquiry that may be made by the court on distribution, but was designed simply to enable the court to make distribution in the cases there specified, *to the persons entitled under the law to distribution, without further notice than that specified in the section*. The provisions as to the powers and duties of the court on distribution are to be found in the sections contained in the chapter, relating to the partition, distribution, and final settlement of estates, and the sections material to this controversy are sections 1665, 1666, and 1678 of the Code of Civil Procedure. Under these sections the only persons whose

¹43 Am. St. Rep. 124.

claims to distribution can be considered are those who claim directly from the deceased as heirs, devisees, or legatees, and those who claim as their assignees, under conveyances made by them subsequent to the death of deceased.

Respondent's claim is based upon section 1106 of the Civil Code, which provides as follows: "Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors."

It may be that any title to this property that appellant acquires from deceased passes by operation of law to respondent, by virtue of the deed alleged to have been executed by appellant seventeen years prior to the death of deceased. The court had no right, however, against the objection of appellant, to determine on distribution whether or not any such deed was ever executed, or as to the effect thereof, for it was not a conveyance made by an "heir, legatee, or devisee." At most, it was an attempted conveyance by one who then had no transferable interest in the property here involved, and the determination of questions relating thereto is not within the scope of the probate proceedings, and is not authorized by the statute.

The decree of distribution will judicially determine the question as to whether or not the appellant acquired any title to the property of his daughter under the law of succession, and a decree distributing the property to appellant will not estop respondent from asserting, in a proper proceeding, any claim she may have under section 1106 of the Civil Code to the title so determined to have been acquired by appellant.

Our conclusion upon the question discussed makes it unnecessary to consider the other questions presented by this appeal.

The decree of the superior court distributing the property of the estate of the deceased to Mary Moore is reversed and the cause remanded for further proceedings.

McFarland, J., Van Dyke, J., Beatty, C. J., Lorigan, J., and Henshaw, J., concurred.

[Sac. No. 926. Department Two.—December 22, 1903.]

S. C. BROWN et al., Appellants, v. CITY OF VISALIA et al., Respondents.

PUBLIC SCHOOLS—MUNICIPAL INCORPORATION ACT—PRIMARY AND GRAMMAR SCHOOLS—LIMITATION OF LEVY—REVENUE FOR HIGH SCHOOL.—A city of the fifth class, organized under the Municipal Corporation Act of 1883, which limited its power to the establishment of primary and grammar schools, and to the levy of a maximum tax for their support, has additional power, under the subsequent enactment of sections 1669, 1670, and 1671 of the Political Code, to establish and maintain a high school within the limits of the city; and such limitation of the amount of levy under the Municipal Corporation Act has no application to the matter of providing a revenue for the maintenance of the high school so established.

ID.—LEVY OF TAXES FOR HIGH SCHOOL—ESTIMATE OF HIGH-SCHOOL BOARD.—It is the duty of the board of trustees of such city to levy a special tax for the support of the high school established therein, upon the estimate of the high-school board, whose duty it is to make such estimate yearly after the establishment of the high school.

APPEAL from a judgment of the Superior Court of Tulare County. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

Alfred Daggett, and Maurice E. Power, for Appellants

D. E. Perkins, and Bradley & Farnsworth, for Respondents.

LORIGAN, J.—This appeal involves the validity of a tax levy for high-school purposes, made by the board of trustees of the city of Visalia.

A demurrer to the complaint, seeking to enjoin the collection of such tax, was sustained, and plaintiffs declining to amend, judgment was entered against them, and they appeal.

Visalia is a city of the fifth class, organized under the Municipal Corporation Act of 1883 and amendments thereto, and has therein primary and grammar schools, and a high school and high-school district, duly organized and established under sections 1669, 1670, 1671 of the Political Code, as enacted in 1893 (Stats. 1893, pp. 268, 274), the boundaries of said

district being commensurate with those of the said city of Visalia.

In October, 1890, the board of education of said city, as such, presented to the board of trustees thereof an estimate of the amount of money required from said city, to maintain the primary and grammar schools therein for the current year, after deducting the amount which would probably be received from the state and county apportionment for that purpose. This estimate was twelve hundred and fifty dollars.

Said board at the same time, but constituted however as a high-school board, pursuant to the requirements of subdivision 14 of said section 1670 of said Political Code, also presented to the said trustees a separate, tabulated estimate of the amount of money required for conducting said high school in said city for the current year—said amount being something over eleven thousand dollars.

Thereafter, said board of trustees made its annual levy of taxes for municipal purposes, and in addition to a levy for primary and grammar school purposes, included therein a levy of eighty-four cents on each one hundred dollars for the high-school fund, based on the estimate of said high-school board, as presented to said trustees.

It is this levy of eighty-four cents that the appellants claim is void.

This contention is based upon certain provisions of the Municipal Corporation Act which govern the levy of taxes in municipalities of the fifth class, such as the city of Visalia, and which appellants claim limit the amount of the levy which the board of trustees could make for the support of public schools established within the city, including primary, grammar, and high schools.

Referring to these provisions, on which this claim is based, subdivision 9 of section 764 of the act vests in the board of trustees power to levy and collect annually a property tax which shall be apportioned as follows: “. . . For school fund not exceeding twenty cents on each hundred dollars . . . ,” or possibly, under another section of the act, twenty-five cents on each hundred, for the like purpose. It is of no moment to the question involved here which provision governs, because the amount levied is in excess of either limitation.

Section 978 thereof, defining the powers and duties of the board of education of such cities of the fifth class, authorizes them, first, "to establish and maintain public, primary, kindergarten, grammar, and evening schools." From the averments in the complaint it is apparent that the only schools maintained in said city under said section are primary and grammar schools.

By subdivision 8 of the same section said board is also authorized "to determine annually the amount of money required for the support of the public schools and for carrying into effect all the provisions of law in reference thereto," and "to submit . . . a careful estimate of the whole amount of money to be received from the state and county, and of the amount to be required from such city for the above-mentioned purposes; and the amount so found to be required from the city shall, by the board of trustees, be added to the above amounts to be assessed and collected for city purposes, and when collected the proceeds thereof shall be immediately paid into the school fund of such city, to be drawn out only upon the order of the board of education."

Those are the only provisions in the Municipal Corporation Act to which our attention is directed, or which have any bearing upon the subject under consideration.

It is insisted by respondent that these sections of the code have no application to the matter at issue; that the levy provided for under the Municipal Corporation Act is for primary and grammar school purposes only; that under the law none of said funds can be applied to high-school purposes, and that the money to be levied for such high school is to be levied by said board of trustees, not by virtue of the sections of the Municipal Corporation Act, but, under various subdivisions of section 1670 of the Political Code. These subdivisions, in as far as they are necessary to illustrate the point made by counsel for respondent, are as follows:—

Subdivision 7 of said section (Stats. 1897, p. 81), provides: "In any city . . . which shall have established a high school, the board of education or board of school trustees shall constitute the high-school board and shall have the management and control of said high school."

Subdivision 14 thereof declares that: "In any city . . . which shall have voted to establish and maintain a high school,

it shall be the duty of the high-school board therein to furnish to the authorities whose duty it is to levy taxes . . . an estimate of the cost of purchasing a suitable lot . . . and erecting a suitable building, of furnishing the same . . . and of conducting the school for the school year. . . . It shall be the duty of said board, each and every year thereafter, to present to said authorities . . . an estimate of the amount of money required for conducting the school for the school year."

Subdivision 15 provides that: "When such estimates shall have been made and submitted it shall be the duty of the authorities whose duty it is to levy taxes in said city . . . to levy a special tax upon all of the taxable property of said city, sufficient in amount to maintain the high school, or to purchase the site, erect a building, or improve the buildings or grounds. Said tax shall be computed, entered upon the tax-roll, and collected in the same manner as other taxes are computed, entered, and collected."

And subdivision 18 of said section provides that all moneys so collected from a levy of such tax shall be paid into the treasury of the city, to the credit of the high-school fund, and paid out upon the warrants of the high-school board.

These provisions, with the sections cited from the Municipal Corporation Act, constitute all the statute law upon the subjects, and upon a comparison and consideration of these provisions relied on by the respective parties, with such light as is thrown upon the subject in a general way by decision of this court relative to the organization of high-school districts, the power of their boards and the duty to provide for high-school maintenance, we are satisfied that the contention of respondent must be sustained.

The stress of appellants' argument, that the provisions of the Municipal Corporation Act are conclusive upon the power to levy taxes for any school purpose, rests upon the assumption that the term "school fund" in section 764 of said act comprehensively embraces the amounts to be levied for all school purposes—primary, grammar, and high school—and that the term "public schools" in section 798 embraces all schools within the public school system as defined by the constitution. (Const., art. IX, sec. 6.)

The fact is, however, that the Municipal Corporation Act of 1883, including the sections relied on, was in existence long

before any valid legislation was enacted (Pol. Code, secs. 1669, 1670, 1671,—Stats. 1893), providing for the organization of high-school districts and the establishment and maintenance of high schools, and it can hardly be assumed that such schools were comprehended within the terms “public schools,” or “school fund,” as used in the Municipal Corporation Act, when they had no existence in fact. At the time this Municipal Corporation Act was passed, the legislature, in harmony with the constitutional requirement (art. IX, sec. 5), had provided for a system of common schools which embraced only primary and grammar schools, and all existing legislation on the subject had in view solely the establishment and support of such schools.

Under the law they were, and are, to be supported primarily from the state fund and the fund derived from county taxes, and these funds are required to be devoted exclusively to that purpose (*Stockton School District v. Wright*, 134 Cal. 67), by the boards of education or boards of school trustees under whose control they are placed, supplemented by such an amount, derived from municipal taxes, as will make up the sum actually necessary for their support for the school year. It will be observed, too, that the only schools which the board of education is authorized to maintain, under the first subdivision of section 798 of the act, and necessarily over which it has control, aside from kindergarten and evening schools, are primary and grammar schools.

This being true, it would seem only a reasonable conclusion to reach, that the fund to be provided by the trustees on the estimate of said board, and under the act, is for the only purpose the board can expend it—for maintaining the established primary and grammar schools.

The board is not authorized to establish high schools, or to require or expend money for their maintenance; this latter power, it will be observed further on, belongs exclusively to the high-school board, and we are satisfied that this is what section 798 of the act contemplates, and alone contemplates, because the amount to be levied by the city is to be determined by taking as a basis of calculation the prospective state and county fund, and this is a proper factor to be taken into consideration only in estimating a fund for primary and grammar school purposes. So that construing this provision of it-

self, and in view of the fact that when it was enacted (because it is the same now as when originally passed in 1883) there were no high schools in existence, and in the light of the constitutional provision which, while making high schools part of the school system, provides that "the entire revenue derived from the state school fund and from the general state school tax shall be applied exclusively to the support of primary and grammar schools," together with the fact that the moneys derived from the county taxes can only be applied to maintaining primary and grammar schools, it is a reasonable deduction to be arrived at, that the amount so to be estimated by the board of education, and the amount to be levied by the trustees on such estimate—as far, at least, as high schools are concerned—is the difference between what would probably be received from the state and county to be exclusively devoted for primary and grammar purposes, and the total amount actually needed from the city, and authorized to be levied by the trustees for that purpose.

Aside from this, however, the true solution of the question, we think, is to be reached more from a consideration of the subdivisions of the Political Code than an examination of the provisions of the Municipal Corporation Act. These code provisions (secs. 1669, 1670, 1671), providing for the establishment and government of high-school districts, and particularly the subdivisions of section 1670, heretofore set out, to our mind leave no doubt upon the subject. These provisions were intended to, and did, establish a system of schools—high schools—which, while contemplated by the constitution, still no provision had theretofore been made for their organization and establishment.

Primary and grammar schools existed in all communities throughout the state, and their establishment and maintenance, whether existing in, or outside of, municipalities, had from the earliest date in the educational system of this state been fully provided for by law. In establishing high schools, the legislature—as nothing of a similar character had heretofore existed—had to provide a complete scheme for their establishment, the method of their government, and the manner of their maintenance. While it was intended to make their establishment, as the constitution provided, a part of the public school system, it was equally intended to make them entirely distinct

from primary and grammar schools—a different educational instrumentality, governed by a different board, provided with a distinct fund, to be secured in a different way from that provided for securing funds for the common schools. The whole scheme of their creation evinces this purpose.

While it is provided by subdivision 7 of section 1670 of the Political Code that the board of education in the city where the high school is established shall have control of that school, it is distinctly provided that such control shall be had, not as a board of education, but as a high-school board. For all purposes of controlling primary and grammar schools, it shall constitute a *board of education*, but as to high schools, it shall constitute a *high-school board*; and this distinction is made necessary because, under section 798 of the Municipal Act, the moneys obtained under the general levy provided for therein shall constitute the “school fund,” to be paid out under order of the *board of education*, while by subdivision 18 of section 1670 of the Political Code the taxes derived under subdivision 14 of said section shall be paid into the said treasury to the credit of the “*high-school fund*,” and paid out only on the warrants of the *high-school board*.

Now, coming to the vital question as to how this high-school fund is to be obtained: It must be conceded that, as far as the power of the board of education is concerned to estimate the amount necessary to conduct the schools of the city, as provided by section 798 of the act, it does so solely and exclusively as a *board of education*. In estimating the amount necessary for maintaining the high school, by subdivision 14 of section 1670, it acts exclusively and solely as a *high-school board*. As these boards are distinct, and as the board of education, as such, has control only over the school funds provided for the maintenance of primary and grammar schools, the only estimate it can make and furnish the board of trustees in that capacity is for the purposes over which it alone has control, to wit, primary and grammar school purposes; and as the board of trustees is required, under the same section, to add such amount found necessary by the board of education (less such amount as probably will be received from the state and county for school purposes) to the other amounts to be as-

sessed for city purposes, it must reasonably follow that, as its power to make the levy proceeds solely from the estimate of the board of education, that the only levy it can make under its general power to provide not exceeding twenty per cent for a school fund, is to provide the fund which the board of education as such can alone require and control, to wit: the fund necessary for primary and grammar school purposes only.

On the other hand, by subdivision 14 of section 1670 of the Political Code, it is made the duty of the high-school board, as distinguished from the board of education, to furnish to the authorities whose duty it is to levy taxes (the board of trustees, if the high-school district is in a municipality; the board of supervisors, if the district is outside a municipality) each and every year after the establishment of a high school, an estimate of the amount of money required for conducting the school for the school year.

Subdivision 15 of the same section makes it obligatory on the authorities whose duty it is to levy taxes for said city to levy a *special tax* upon all the taxable property of said city, sufficient in amount to maintain the high school, and provides that said tax shall be computed and collected in the same manner as *other taxes* are computed and collected.

It will be observed from the reading of these provisions that this estimate is to be made by the *high-school board*, and that the levy is not to be made under any general provisions of the Municipal Corporation Act empowering the city to levy taxes for school purposes, but is to be the levy of a *special tax*, and therein, we think, lies the solution of the whole question. The *board of education*, acting under the Municipal Corporation Act, and having control over the fund for primary and grammar school purposes only, estimates the amount necessary for that purpose as such board, and under the general provision to levy a tax for a school fund, the board of trustees upon such estimate does so for the only purpose the board of education is authorized to require it; the *high-school board*, acting as an independent body under the Political Code, makes its estimate for a high-school fund as distinguished from any other school fund, and the board of trustees, under subdivision 15 of the

code, levy a *special tax*, to be collected as other taxes of the municipality are collected.

It was only proper, in providing for the establishment and support of high schools, that the legislature should provide that the revenue therefor should be collected by special tax, because when the establishment of these schools was authorized and provision made for their maintenance, the Municipal Corporation Act had already placed a limit upon the amount which could be levied by the trustees for existing primary and grammar schools—a limit within which a reasonable fund for those purposes, and no other, might be provided.

Under such circumstances, it would hardly have been fair to require the amount necessary to establish and maintain a high school to be obtained within the same limitation. The result might be that revenue obtained within the limitation would not furnish a sufficient amount for the complete maintenance of either, and hence the efficiency of both institutions, which the law designed to foster, would be impaired.

On the other hand, by requiring the revenue for the high school to be collected by special tax, the power of the board of trustees to fully provide within the limitation for primary and grammar schools would not be impaired. This construction of these statute provisions is all the more reasonable when we take into consideration the fact that it has always been the duty of a municipality to establish and maintain primary and grammar schools, while it is entirely optional with it whether it shall establish and maintain a high school. In the beginning of this opinion we referred to the fact that the matter of high schools had been before this court several times, and while the particular point now under review was never presented, enough was involved to warrant the court in determining that high schools are governed by different laws of taxation than obtain in school districts generally, whether embraced within municipalities or not. (*Chico High School Board v. Supervisors*, 118 Cal. 115; *Board of Education etc. v. Board of Trustees of Woodland*, 129 Cal. 599.)

In the first case, after quoting the constitutional provision of section 6 of article IX, the court, at page 119, says: "It will be seen from this constitutional provision that while 'high

schools' are an integral part of our public school system, the expense of their maintenance is to be met by necessary taxation, independent of the general school tax, and of the revenue derived from the state school fund. We think it apparent from the language used in 1670 . . . that the legislature comprehended that the duty of levying taxes for the support of high schools would, under different circumstances, devolve upon different boards or authorities. Hence the high-school board is required to furnish estimates of the amount of money required 'to the authorities whose duty it is to levy taxes.' " In *People v. Lodi High School District*, 124 Cal. 694, the court had under review the constitutionality of section 1670 of the Political Code. In that case the high-school district was not formed in any city, and hence the duty of levying taxes for its maintenance under said section was cast on the supervisors. The principle involved, however, is the same as if the high-school district embraced a city of the fifth class, because by section 1818 of the Political Code a limitation is as effectually placed on the powers of the board of supervisors, both as to the purpose of the fund and the amount of the levy, as is placed on the trustees under the Municipal Corporation Act.

In the case referred to in considering subdivisions 14 and 15 of said section relating to the levy of a special tax for the support of high schools, the court says: "It is claimed that the section is special legislation because it takes from the operation of the general law for the levy of taxes a certain class of school districts, and it applies to these districts alone, and vests in the board of supervisors a power to levy a tax which the general laws of the state do not give that board; and gives to the high-school board initiatory powers with respect to taxation not possessed in any other district. All this may be true without making the law special legislation in the sense the term 'special' is used in the constitution. It is within the power of the legislature to constitute these schools, and to provide for their support by methods different from those adopted for like purposes as to other schools. In a sense the provision had to be special, for no part of the state school fund or general school tax could be used to support the high school. The law is general in its operation, for it applies alike to all cities, incorporated towns, and school districts having a population of one thousand inhabitants or more; and it is general in its purpose,

for it gives to all the inhabitants of the state similarly situated equal opportunity to avail themselves of the benefits to be derived from these schools. The nature and objects of these schools suggest a classification different from the common school corporation, and rationally justify the diversity in the legislation as to them."

We are satisfied that high schools were intended to be and are organized, and are required to be maintained under laws separate and distinct from those applying to other schools, and that the complete scheme for their organization, government, and maintenance is to be found in the provisions of the Political Code above cited. That the limitation as to the amount which, under the municipal act, a city of the fifth class may raise as a school fund, has no application to providing revenue for the maintenance of a high school established in said city, but that under the provisions of subdivisions 14 and 15 of section 1670 of the Political Code an additional duty is imposed upon the board of trustees to levy a special tax to be collected as other taxes are collected for the support of such schools.

Entertaining these views, the judgment of the lower court is affirmed.

McFarland, J., Angellotti, J., Shaw, J., Van Dyke, J., and Henshaw, J., concurred.

[Sac. No. 932. Department Two.—December 22, 1903.]

TOWLE BROTHERS COMPANY, Respondent, v. MRS. MARY QUINN et al., Defendants; CHARLES F. HANLON, Appellant.

FORECLOSURE OF MORTGAGE—JURISDICTION OF COURT—ACTION FOR PARTITION.—In an action for the foreclosure of a mortgage, the court has merely jurisdiction to foreclose the mortgage sued upon and the rights of all parties holding under and subject thereto. It had no jurisdiction to reach over into a separate partition suit, begun prior to the execution of the mortgage by one of the tenants in common who were parties to that suit, and to take control and jurisdiction thereof in the interest of the mortgagee.

ID.—DUTY OF MORTGAGEE TO INTERVENE IN PARTITION SUIT.—The mortgagee having no lien when the action for partition was begun, the plaintiff therein was not bound to make a party thereto; but it was the right and duty of the mortgagee to intervene in the partition suit, and set up his mortgage lien, and have it adjusted in the partition decree as provided by the code.

APPEAL from a judgment of the Superior Court of Placer County and from an order denying a new trial. E. D. Ham, Judge presiding.

The facts are stated in the opinion of the court.

Charles F. Hanlon, and William G. Cousins, for Appellant.

The respondent having no title when the partition suit was commenced, was not a necessary party thereto (Code Civ. Proc., sec. 754), and the mortgage that he took *pendente lite* not having been set up by way of intervention, the mortgagee is concluded by the interlocutory decree, which became final by failure to appeal therefrom. (*Amador etc. Co. v. Mitchell*, 59 Cal. 179; *Hart v. Steedman*, 98 Mo. 256; *Loomis v. Riley*, 24 Ill. 310.) The adverse title of appellant could not be litigated in this foreclosure suit. (*Wilson v. Bank of California*, 121 Cal. 630; *San Francisco v. Lawton*, 18 Cal. 465.¹) The court foreclosing the mortgage had no jurisdiction over the prior partition suit.

George W. Hamilton, for Respondent, filed no brief.

McFARLAND, J.—This is an action for the foreclosure of a mortgage, and defendant Hanlon appeals from the judgment in favor of plaintiff and from an order denying his motion for a new trial.

Appellant has filed an elaborate brief in which he makes a number of contentions for a reversal. Respondent has not filed any brief, and has not made any reply, either written or oral, to appellant's points. Under these circumstances we cannot be expected to examine appellant's contentions as fully and closely as if respondent had presented us with some arguments, suggestions, or authorities tending to weaken those contentions. Apparently some of appellant's positions are tenable.

¹ 79 Am. Dec. 187.

The mortgaged premises were owned before and at the time of the execution of the mortgage sued on by certain persons named Quinn, and the appellant, Hanlon, as tenants in common. On April 10, 1896, Hanlon brought an action against the Quinns for a partition of the premises, and prayed also for an accounting for rents, issues, and profits, and a judgment against the Quinns therefor. Six days afterwards he filed a *lis pendens*, and a receiver was appointed to take charge of the property. On April 7, 1897, an interlocutory decree was made in said action, decreeing that Hanlon was the owner of one fifth of the premises and the Quinns four fifths, and awarding Hanlon costs in the sum of \$38.05, and declaring that the Quinns had been in possession, receiving the profits, etc.; that Hanlon was entitled to an accounting, and appointing a commissioner to take the account. Afterwards the commissioner, having heard the matter, reported that the Quinns were indebted to Hanlon for the rents, etc., in the sum of two thousand dollars, and the court rendered judgment in Hanlon's favor for that amount and costs. In the interlocutory decree the court found that the property could not be divided, that it should be sold and the proceeds divided between the tenants in common, and appointed three referees to make the sale. The referees advertised the property for sale, but it had not been sold at the time the judgment in the present case was rendered. In the meantime Hanlon had taken out an execution on his two-thousand-dollar judgment against the Quinns, had purchased the Quinns' interest at the sale, and had received a sheriff's deed therefor. No appeal was taken from the interlocutory decree, or from the said money judgment against the Quinns, and the time for appealing had expired.

On February 15, 1897,—which was more than ten months after the commencement of the partition suit,—the Quinns executed the mortgage sued on to respondent to secure the sum of two hundred dollars. This mortgage was not recorded until April 15, 1897, which was after the entry of the interlocutory decree in the partition suit. The respondent never appeared in the partition suit, nor sought in any way to assert his rights in that suit. He commenced the present foreclosure suit on June 14, 1899. The original complaint

was in form an ordinary complaint in foreclosure, with the usual prayer for the sale of the property, etc.,—Hanlon being made a party defendant on the simple averment that he claimed some interest in the mortgaged premises. Afterwards by leave of court, and over the objection of appellant, an amendment to the complaint was filed, in which the proceedings in the partition suit, as above related, were set forth, and the referees appointed in the partition suit to sell the property were made parties defendant. And it was prayed that it be ordered that the premises be sold “under the decree in partition,” and that “this court order and direct the said referees to pay to this plaintiff the amount of its judgment herein from any sum arising from a sale of the premises under the decree in partition aforesaid that would otherwise be payable to the said defendants Quinn or either of them,” and that respondent’s judgment herein be “first payable” out of the proceeds of the sale under the decree of partition, and judgment was entered in accordance with this prayer.

Waiving other points made by appellant, we think that in this action to foreclose a mortgage, which is based on section 726 et seq. of the Code of Civil Procedure, the court had no power to reach its hands over into the separate and independent action for partition, and take control and jurisdiction of such action. It had merely jurisdiction to foreclose the mortgage sued on, and order the mortgaged premises sold, and to foreclose the rights of all parties holding under and subject to the mortgage. The plaintiff in the partition suit was not called upon to make the respondent herein a party defendant, for he had no lien of record when that suit was commenced. (See Code Civ. Proc., secs. 752-801.) Indeed, when the suit was commenced respondent had no mortgage at all; and the one which was afterwards executed to it was not recorded until after the interlocutory decree, but respondent undoubtedly had the right, and it was its duty, to intervene in that suit and set up its mortgage lien, and have it adjusted in the partition decree as provided by the code. At least, it could not afterwards in its separate action to foreclose the mortgage, rightfully ask the court to cross

over and take charge of the partition suit. This is not a bill to vacate a judgment on the ground of fraud, etc.

The judgment and order appealed from are reversed.

Lorigan, J., and Henshaw, J., concurred.

[Sas. No. 1001. Department Two.—December 22, 1903.]

DOROTHEA BECKER, formerly Dorothea Schwerdtle, Appellant, v. JOHN GEORGE SCHWERDTLE, Respondent.

TRUST—CONFIDENTIAL RELATION—MOTHER AND SON—PLEADING—SUFFICIENCY OF COMPLAINT—ACTUAL FRAUD.—In an action to enforce a trust in real property, and to compel a conveyance, a complaint showing the confidential relation of mother and son between the parties, and that the deed was delivered by an aged mother to her son in expectation of her death, and upon the special trust and confidence reposed in him that in case of her recovery he would pay her twenty dollars per month for her support, which he fraudulently induced her to believe that he would do, and that when the deed was delivered he did not intend to pay said sum for her support, and wholly refused to do so, and claimed to own the property, which was of the rental value of sixty dollars per month, states a cause of action for relief on the ground of actual fraud, within the rule of *Brison v. Brison*, 75 Cal. 527.¹

1d.—UNCERTAINTY—WANT OF EXPRESS PROMISE—SILENCE—TACIT AGREEMENT—CONSENT TO CONDITIONS OF DELIVERY OF DEED.—The complaint is not demurrable for uncertainty because the complaint does not allege an express promise by the defendant to make the monthly payments requested by the defendant's mother. It is sufficient that the averment of all the facts connected with the delivery of the deed show a silent acceptance of it under circumstances which made the silence equivalent to a tacit agreement and consent to the conditions which accompanied the delivery of the deed.

APPEAL from a judgment of the Superior Court of Sacramento County. Peter J. Shields, Judge.

The facts are stated in the opinion of the court.

¹ 7 Am. St. Rep. 189.

A. L. Shinn, for Appellant.

The complaint states a cause of action for actual fraud growing out of confidential relations. (*Brisson v. Brisson*, 75 Cal. 525;¹ S. C. 90 Cal. 323; *Hayes v. Gloster*, 88 Cal. 560; *Butler v. Hyland*, 89 Cal. 577; *Ross v. Conway*, 92 Cal. 632; *Jackson v. Jackson*, 94 Cal. 446; *Hayne v. Herman*, 97 Cal. 250; *White v. Warren*, 120 Cal. 322; *Odell v. Moss*, 130 Cal. 352; *More v. More*, 133 Cal. 489; Civ. Code, sec. 2235; 2 Pomeroy's Equity Jurisprudence, secs. 955-958; 1 Story's Equity Jurisprudence, sec. 307; Beach on Trusts and Trustees, secs. 105, 106.)

White & Seymour, for Respondent.

The complaint does not state a cause of action. (Civ. Code, sec. 1040; *Tillaux v. Tillaux*, 115 Cal. 663, 667-669; *Smith v. Mason*, 122 Cal. 426; *Soberanes v. Soberanes*, 97 Cal. 140; *Downing v. Rademacher*, 133 Cal. 220;² *Earle v. Chance*, 12 R. I. 374.) In the cases cited by the appellant there was an express agreement made with intent to deceive, which is wholly lacking in this case. The allegations of the complaint are uncertain. (*Sheehan v. Sullivan*, 126 Cal. 189.)

LORIGAN, J.—The lower court sustained a demurrer to the second amended complaint in the above action, without leave to amend. A judgment of dismissal was thereupon entered, and plaintiff appeals.

The action was brought to have a trust declared as to certain real property, and to compel a conveyance.

The complaint sets forth that plaintiff and defendant are mother and son, the former aged sixty years, the latter thirty-six; that the most confidential relations always existed between them, plaintiff reposing the greatest confidence in her said son, advising with him in all her business affairs, and believing that he would deal justly and fairly with her in all matters. That on September 2, 1898, she was the owner of certain real estate in Sacramento and Placer counties, of the value of four thousand dollars, and on that date, in harmony with a desire she always entertained that the defendant should

¹ 7 Am. St. Rep. 189.

² 85 Am. St. Rep. 160.

have all her property at her death, made and acknowledged a deed in his favor, intending to place the same in escrow, to be delivered to him on her demise. This was not done, however, and she retained it in her possession. Thereafter, on March 31, 1899, plaintiff, becoming very ill, and being enfeebled in mind and body, fully believing that she would never recover from such illness, and that she had but a few days to live, and placing every trust and confidence in the defendant, and desiring him to have all her property on her death, and without seeking or obtaining advice from any person, and in expectation of impending death, delivered said deed to defendant, transferring to him all her property. That, at the time she delivered such deed, she stated to defendant that, in case of her recovery, she would expect him to pay her twenty dollars per month for her support; that defendant did not say whether or not he would comply with said request, but having great trust and confidence in him she believed he would comply with it; that the consideration mentioned in said deed (love and affection and better maintenance, support, protection, and livelihood of defendant) was not the true consideration thereof, but the only consideration was the trust and confidence plaintiff reposed in defendant, together with the desire that he should have all of her property at her death; that she would not have delivered such deed had she not believed that she had but a short time to live, and but for the trust and confidence she reposed in her said son; that contrary to her expectation she recovered from said illness, but at all times since has been in ill-health, and without adequate means of support; that she has requested defendant to pay her said twenty dollars a month for her support, but he has refused to do so. She further avers that when said deed was delivered the defendant did not intend to comply with her request to pay said twenty dollars a month in case of her recovery, but, by accepting said deed and by his silence, fraudulently induced her to believe that her request would be complied with; that he now claims to own said property, is in possession of it, and that the value of the rents and profits thereof is sixty dollars a month.

The complaint was demurred to on many grounds, and sustained generally, and it is particularly urged by respondent on this appeal that the allegations of the complaint are

insufficient to warrant the interposition of a court of equity, and that the demurrer was properly sustained for that reason alone.

We cannot agree with this claim. We think the allegations made out a case within the doctrine announced in *Brison v. Brison*, 75 Cal. 527,¹ and approved in subsequent cases.

In fact, it appears that the complaint in the case at bar is principally modeled after the complaint in that action, and in the light of that decision.

While it is claimed by the appellant that the complaint sufficiently states a cause of action for both constructive and actual fraud, it is evident that it was framed to particularly charge actual fraud; such fraud consisting in the making of the promise under which the deed was delivered, without any intention of performing it, and coming within the provision of the Civil Code declaring that a promise made without any intention of performing it constitutes actual fraud.

Brison v. Brison deals fully with this provision of the code, in cases where confidential relations exist, and where, springing from that relationship, and as the consideration therefor, a conveyance is made under an agreement, which at the time it is made is not intended to be performed by the grantee.

That was an action brought by a husband to set aside, for actual fraud, a conveyance made to his wife, the fraud alleged being that the promise made by her upon which he delivered the deed was in bad faith and false, and "made with intent on her part to deceive and did deceive" him. The lower court in that case, as in this, sustained a demurrer to the complaint, and on appeal this court in reversing such order and holding the complaint sufficient, said: "We think there was actual fraud. As above stated, the complaint shows that the parol promise upon which plaintiff relied was false and 'in bad faith,' and 'made with intent to deceive.' The construction which we think must be given to this averment is, that the promise was made without any intention of performing it. This is a well-recognized species of fraud. (See Bigelow on Frauds, pp. 483, 484; *Sandfoss v. Jones*, 35 Cal. 481, 482.) And the Civil Code expressly provides that 'Actual

¹ 7 Am. St. Rep. 189.

fraud . . . consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract. . . . *A promise made without any intention of performing it.*' (Civ. Code, sec. 1572.) Now, inasmuch as it is admitted by the demurrer that the promise was made without any intention of performing it, we think the case falls directly within the provision. An instance of the application of the principle to facts similar to those of the case before us in *Newell v. Newell*, 14 Kan. 202. It is to be observed of this ground that the essence of the fraud is the existence of an intent at the time of the promise not to perform it. But for such intent there would be no actual fraud. For it is well settled that the mere failure to fulfill a promise is not fraud. . . . But if the evil intent existed, there was actual fraud, and so far as this ground is concerned, it is immaterial whether there was a confidential relation or not. . . . Nor is it necessary to consider what would be the rule in cases where it appears that there was in fact no actual confidence between the parties—that is to say, where the wife is living in independence of or in hostility to the husband. (See *Falk v. Turner*, 101 Mass. 496.) For it is averred that the plaintiff 'had at all times confidence in his said wife and her devotion and fidelity to him,' and that he made the deed having confidence in his said wife, and in her said representation and promises, and relying upon the same.'

"The relation of the parties to each other, therefore, was confidential in fact, as well as in law. The plaintiff was induced to make the deed by the confidence which he had in his wife, and the belief thereby engendered that she would perform her promise. But for that he would not have made it." (*Brison v. Brison*, 75 Cal. 527, 529.¹)

In the complaint now under consideration there are sufficient allegations showing the trust and confidence reposed in plaintiff by defendant, springing from the relationship of mother and son; his promise to her upon which she relied, and had a right to rely, when she delivered him the deed, and which she delivered solely on account of the trust and confi-

dence reposed in him; his failure to keep such promise, and the further averment that when he made such promise and accepted the deed he had no intention of keeping the promise; and these allegations, tested under the rule laid down in *Brison v. Brison*, appear to be entirely sufficient.

The cases of *Newman v. Smith*, 77 Cal. 26, *Nordholt v. Nordholt*, 87 Cal. 552,¹ and *Hay v. Gloster*, 88 Cal. 565, are in harmony with *Brison v. Brison*.

Respondent relies on the cases of *Tillaux v. Tillaux*, 115 Cal. 667; *Smith v. Mason*, 122 Cal. 426; *Soberanes v. Soberanes*, 97 Cal. 140, and *Downing v. Rademacher*, 133 Cal. 220.² But these have no application to the case made under the complaint. Nor have the cases cited from other jurisdictions.

In the *Tillaux* case no question of actual fraud was involved, and the facts show that there were no confidential relations upon which constructive fraud could be predicated. In *Smith v. Mason* the suit was not brought by the grantor, but by contending heirs after his death, and no question of fraud arose in the case. In *Soberanes v. Soberanes* no violation of confidential relations was shown, and actual fraud was not involved. *Downing v. Rademacher* is inapplicable for like reasons.

Counsel for respondent also contends that the lower court was warranted in sustaining the demurrer upon other grounds; that there is an improper joinder of causes of action, and that the complaint is uncertain in some particulars. We do not think these points possess any merit.

One element of uncertainty claimed by respondent is, that it does not appear from the complaint that the defendant ever promised to comply with the request of plaintiff made at the time the deed was delivered to him. The plaintiff, however, undertakes to aver in her complaint all that took place at that particular time; the request, the accompanying delivery, and the acceptance of the deed without response. Such acceptance under these circumstances, by defendant, was a tacit agreement to comply with the request which accompanied the delivery. Silence under such circumstances is equivalent to consent. If he did not choose to accept the deed under the

¹ 22 Am. St. Rep. 268.

² 87 Am. St. Rep. 160.

terms of confidence reposed in him, it was his duty to have said so. Accepting it in silence, he is deemed to have agreed to whatever conditions accompanied the delivery.

The judgment is reversed, with directions to the lower court to overrule the demurrer to the complaint, with leave to defendant to answer.

McFarland, J., and Henshaw, J., concurred.

[Sac. No. 1003. Department Two.—December 22, 1903.]

F. M. SWASEY, Respondent, v. COUNTY OF SHASTA
et al., Appellants.

COUNTY GOVERNMENT ACT—"BUILDINGS" BY COUNTY—"FENCE"
—DUTY TO ADVERTISE FOR BIDS—PROHIBITION.—Under the provisions of the County Government Act, requiring that all necessary "buildings must be erected by contract let to the lowest responsible bidder," after a required notice by publication, the term "buildings" is intended to include the erection of an iron "fence" around the grounds upon which the courthouse of the county is situated. It is the duty of the supervisors of the county to advertise for bids, and let the erection of such fence to the lowest bidder; and prohibition will lie to prevent the enforcement of a contract for its erection to a bidder without such advertisement and letting.

APPEAL from a judgment of the Superior Court of Shasta County. Edward Sweeney, Judge.

The facts are stated in the opinion of the court.

Tirey L. Ford, Attorney-General, U. S. Webb, Thomas B. Dozier, Francis Carr, and Reid, Dozier & Carr, for Appellants.

Braynard & Perry, for Respondent.

McFARLAND, J.—This is an appeal by defendants from the judgment of the court below in a prohibition proceeding therein instituted, prohibiting and restraining the super-

visors of Shasta County from executing a certain proposed contract with persons known as Parcels-Greenwood Company, for the construction by the latter of an iron fence around the grounds upon which the courthouse of said county is situated, and from taking any further action relative to said contract. All questions as to the propriety of the remedy by prohibition and as to necessary parties defendant having been waived, we will not discuss those questions.

The board of supervisors desiring to have an iron fence constructed around the courthouse grounds, on March 12, 1902, the Parcels-Greenwood Company presented to them plans and specifications of such fence and offered to construct it for \$1,735; and at the same time one Masterson also presented to them plans and specifications for the same purpose, and offered to build the fence for \$1,487.85. On the same day the board ordered that the contract be awarded to the Parcels-Greenwood Company for the sum stated by them upon their execution of a contract in accordance with their plans and offer, to be approved by the district attorney and signed by the chairman of the board, etc. But prior to that time the board had not advertised for plans or specifications for said fence, and had not adopted any plans or specifications, and had not given any notice that the contract for construction of the same would be let to the lowest responsible bidder; and for these reasons the court below held the contract void and prohibited any further action toward executing and enforcing it. The question to be determined—as will hereafter be seen—is whether the word “building” as used in the County Government Act, includes the “fence” described in the petition for the writ of prohibition.

Subdivision 8 of section 25 of the County Government Act (Stats. 1897, p. 459) provides that the board of supervisors shall have power “under such limitations and restrictions as may be provided by law,” to provide a courthouse, jail, and hospital, “and such other public buildings as may be necessary,” etc., and it is further provided that none of such buildings shall be constructed until plans and specifications shall have been made therefor and adopted by the board, and that “all such buildings must be erected by contract let to the lowest responsible bidder, after notice by publication in

a newspaper of general circulation published in the county for at least thirty days." If these provisions include the fence in question here, then the proposed contract was unauthorized, and the judgment of the court below prohibiting its execution is right. It will be observed that this case does not raise the question whether a municipality, having accepted, used, and retained the services or the property of another, can repudiate payment on the ground that the contract therefor was not regularly made; here the purpose is to prohibit the making of the contract before any action under it.

There is no well-established legal definition of the word "building" which absolutely, and under all circumstances, either includes or excludes a "fence." The question greatly depends upon the connection in which the word "building" is used, and the evident purpose of the statute or contract in which it is found. In Bouvier's Law Dictionary (Rawle's edition, vol. 1, p. 269) "building" is defined as follows: "An edifice erected by art, and fixed upon or over the soil, composed of stone, brick, marble, wood, or other proper substance, connected together, and designed for use in the position in which it is so fixed." This is about as good a general definition of the word as can be found in the books, and it undoubtedly includes in terms an ordinary fence. The same definition is given in the Century Dictionary, with this addition: "Thus a pole fixed in the earth is not a building, but a fence is." But without taking these definitions as unconditionally correct, we must, as before stated, look somewhat to the context and subject-matter of the instrument to be construed. Thus in *Wright v. Evans*, 2 Abb. Pr. N. S. 308, it was held that a covenant not to erect a *building* within a certain distance of a boundary-line was broken by the erection within the prescribed distance of a fence twenty feet high—the purpose of the covenant evidently being to prevent obstruction of light and air; while in *Nowell v. Boston Academy*, 130 Mass. 209, it was held that the erection of a fence six feet high was not a building within a similar covenant. These cases illustrate the view above expressed. Now, the legislature by the enactment of said section 25 of the County Government Act, in which the word "building" occurs, evidently intended to provide that the

board of supervisors, except in some trivial matters expressly enumerated, shall not have power to purchase public supplies, or to sell public property, or to make contracts for constructive work, otherwise than by advertising proposals to bidders. For instance, subdivision 9 of the section provides that all sales of property no longer required for public use must be by public auction, after notice, unless in the unanimous judgment of the board it is not of greater value than seventy-five dollars; subdivision 4, that all contracts for the construction of bridges, wharves, chutes, etc., exceeding in cost five hundred dollars, must be upon advertisements for bids; subdivision 21, that all ordinary county supplies shall be bought after advertisement for sealed bids; and by subdivision 7 it is provided that real property for the purpose of obtaining water for public use can be purchased only after advertisement of the intention of making such purchase, with the proposed price, etc., and the time when it will be considered. This being the general intent and purpose of the act, and, as we have seen, the word "fence" not being excluded from the definition of the word "building," we think that the case at bar presents an instance where the latter word should be held to include the former. This view makes it unnecessary to determine whether the act of the legislature approved April 1, 1872, (Stats. 1871-1872, p. 925,) entitled "An Act to regulate the erection of public buildings and structures," in which the word "structure" is used, has been impliedly repealed by the County Government Act.

The judgment appealed from is affirmed.

Lorigan, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[Sec. No. 974. Department Two.—December 23, 1903.]

COUNTY OF BUTTE, Respondent, v. D. P. MERRILL et al., Appellants.

TAX-COLLECTOR—COMMISSION ON LICENSE-TAXES—POWER OF SUPERVISORS—ACTION ON BOND.—The board of supervisors of a county have no power either to create a license-tax collector or to fix his compensation; and an ordinance conferring the right upon the tax-collector to retain a commission for the collection of license-taxes is void, and constitutes no defense to an action by the county on his official bond to recover the amount of license-taxes retained as such commission, where the law made it the duty of the tax-collector to collect all licenses when he took the office of tax-collector.

ID.—POWER OF LEGISLATURE—RETROACTIVE LAW—INCREASE OF COMPENSATION.—The legislature cannot pass a retroactive law to give the collector increased compensation over that fixed by law when his term commenced, nor can any increase in the rate of compensation made after the commencement of his term be held applicable during his term.

ID.—THEORY OF TRIAL—ANSWER—STIPULATED FACT—WAIVER OF AMENDED COMPLAINT—SUPPORT OF JUDGMENT.—Where the original complaint included license-taxes between January, 1895, and January, 1898, but it was averred in the answer that the tax-collector had collected the taxes in contest between January, 1895, and January, 1899, and the trial proceeded upon that theory, and the parties made a written statement of facts as to the amount of license-taxes received between the dates alleged in the answer, an amendment of the complaint as to the time within which the money was collected was waived, and a judgment for the amount stipulated is sufficiently supported.

ID.—ACTION ORDERED BY GRAND JURY—PENAL CODE—VALIDITY OF STATUTE—BLENDING OF CODES.—The grand jury had power, under section 929 of the Penal Code, to order the action commenced by the county to recover the license-taxes collected and not paid over. That section is embraced in the title of the act establishing it, and is not void as not being criminal in its nature, and improperly placed in the Penal Code. A statutory provision otherwise valid is not void because found in any particular code. The codes blend into each other, and no one of them is limited to a particular subject.

APPEAL from a judgment of the Superior Court of Butte County. John F. Ellison, Judge presiding.

The facts are stated in the opinion of the court.

Caldwell & Borland, and John Gale, for Appellants.

J. D. Sproul, for Respondent.

McFARLAND, J.—The defendant Merrill was county tax-collector of Butte County from January, 1895, to January, 1899; and this is an action against him and his bondsmen to recover the sum of \$3,245.05, collected by him as such tax-collector during his said term of office and converted to his own use. Judgment went in the court below in favor of plaintiff for the said amount of money, and defendants appeal from the judgment.

The money sued for is part of the whole amount of license-taxes collected by appellant Merrill, and consists of money which he contends he had the right to retain as commissions allowed him by law for the collection of license-taxes. Whether or not he has that right is the question here involved.

Appellant contends that he is entitled to retain the money here in question by virtue of an ordinance of the board of supervisors of Butte County, passed February 10, 1893, and another ordinance passed March 3, 1894,—both passed before Merrill was elected to or commenced his said term of office,—which ordinances provided that for the collection of taxes for business licenses, other than for the sale of liquor, the collector should receive as compensation ten per cent of the amount collected, and should receive five per cent for the collection of taxes for liquor licenses. If said provisions in said ordinances were valid, then respondent was not entitled to recover in this action. But the lower court correctly held that when Merrill took the office of tax-collector the law made it his duty to collect all licenses. (*Ventura County v. Clay*, 112 Cal. 63.) It further correctly held that the board of supervisors had not the power either to create the office of license-tax collector or to fix his compensation. (*County of El Dorado v. Meiss*, 100 Cal. 273.) It was decided in *Dougherty v. Austin*, 94 Cal. 601, that a board of supervisors has nothing to do with fixing the compensation of a county officer. Appellants also rely upon the act of the legislature, approved March 27, 1895 (Stats. 1895, p. 267), which in terms approves and legalizes the commissions theretofore

allowed by board of supervisors for the collection of license-taxes; but the court below correctly held that this was merely an unauthorized attempt, retroactively, to give the collector increased compensation over that fixed by law when his term commenced. Appellants also rely in their briefs, though not in their pleadings, upon section 215 of the County Government Act of 1897 (Stats. 1897, p. 572), which allows a commission of five per cent for the collection of license-taxes; but as that act was passed after the commencement of Merrill's term of office, the court below correctly decided that it could not be held applicable during his term, without violating the constitutional provision against an increase in compensation during the term of an incumbent.

It is contended that the judgment cannot stand, because it is for taxes collected between January, 1895, and January, 1899, while the complaint only includes the period between January, 1895, and January, 1898. But it was averred in the answer that Merrill was collector, and had collected the taxes in contest, "until the second day of January, 1899," and in other parts of the answer the period between January, 1895, and January, 1899, is referred to as the period during which the matters in litigation arose; and the parties entered into a written "statement of facts," in which it is stated that Merrill as tax-collector, "between the seventh day of January, 1895, and the first day of January, 1899, received the sum of \$3,245.05." It sufficiently appears, therefore, that the case was tried on the theory that it involved Merrill's whole term, and that an amendment to the complaint as to the time within which the money was collected was waived.

It is averred in the complaint that the action was commenced in compliance with an order of the grand jury made under section 929 of the Penal Code, which gives the grand jury the power to order the institution of such an action. Section 929 was passed in 1897, and appellants contend that it is unconstitutional and void, because its subject was not embraced in the title of the act under which it was enacted. It is not necessary to determine whether the action could have been maintained without any reference in the complaint to the action of the grand jury, for the title of the act was sufficient. It is as follows: "An act to amend sections

925 and 928 of the Penal Code of the State of California, to add a new section to said code, to be known as section 929, relating to grand juries, their duties and powers." (Stats. 1897, p. 204.) The main objection appears to be that the section is not criminal in its nature, and therefore could not be constitutionally put into the Penal Code; but it has been frequently held that a statutory provision otherwise valid is not void because found in any particular code; that the codes blend into each other, and that no one of them is limited to a particular subject.

There are no other points calling for special notice.

The judgment appealed from is affirmed.

Lorigan, J., and Henshaw, J., concurred.

[Sac. No. 992. Department Two.—December 23, 1903.]

T. E. WINROD et al., Appellants, v. J. C. WOLTERS et al.,
Respondent.

PREFERRED CLAIMS OF LABORERS FOR WAGES—CONSTRUCTION OF CODE—

LIEN NOT GIVEN.—Section 1206 of the Code of Civil Procedure, giving preferred claims to laborers for their wages, provides a remedy for their enforcement which is exclusive, and creates no lien upon the debtor's property which can be enforced or foreclosed in equity.

ID.—INJUNCTION—DISMISSAL OF ATTACHMENT SUIT—ENFORCEMENT OF LIEN.—Laborers having preferred claims cannot maintain an injunction to prevent an attaching creditor from dismissing his attachment suit after notice given to such creditor of their preferred claims according to law; nor can they enforce a lien in equity as against such creditor and the debtor and the sheriff who levied the attachment.

ID.—JURISDICTION OF SUPERIOR COURT—VOID JUDGMENT AND EXECUTION.

—Several laborers, no one of whom has a claim equal to three hundred dollars, and who have no joint interest, cannot give jurisdiction to the superior court by a joinder of their several claims in one action. The superior court had no jurisdiction of the subject-matter of said action, and no power to render a joint judgment in favor of

the several plaintiffs. Such judgment is void upon the face of the record, and the execution issued thereupon is void, and was properly quashed.

APPEALS from a judgment of the Superior Court of Sierra County and from an order denying a new trial, and from an order quashing execution. Stanely A. Smith, Judge.

The facts are stated in the opinion.

F. D. Soward, for Appellants.

The suit was in equity. The fact that the claims when established would be the subject of a preferred lien upon the funds in the hands of the sheriff distinguished this action from a mere suit for wages. (*Edsall v. Short*, 122 Cal. 533; *Kimball v. Richardson*, 111 Cal. 386.) The judgment was not void because the court granted part only of the relief prayed for.

Frank R. Wehe, for Respondents.

The plaintiffs had no lien upon the property, but a purely statutory remedy. (Code Civ. Proc., sec. 1206.) The legal remedy cannot be aided in equity. (1 Jones on Liens, sec. 94; *Buchan v. Sumner*, 2 Barb. Ch. 165.¹) The judgment rendered was void for want of jurisdiction, and is no judgment. (*Myers v. Sierra Valley etc. Assn.*, 122 Cal. 669; *People v. Green*, 74 Cal. 405;² *Freeman on Judgments*, sec. 117.) The execution was therefore void, and was properly quashed.

GRAY, C.—The defendant Wolters commenced an action against Bullock, Whitmore, Turner et al., as mining partners doing business under the firm name of Harmonia Mining Company. In said suit a writ of attachment issued, and under it the sheriff took into his possession certain property supposed to belong to the copartnership defendants in said action. Thereupon the plaintiffs in this case, under the provisions of section 1206 of the Code of Civil Procedure, gave notice by verified statements of their claims against the defendants in that case for labor performed within sixty

¹ 47 Am. Dec. 305.

² 5 Am. St. Rep. 448, and note.

days next before said attachment, which notice was served as provided by the statute. It was then discovered by the plaintiff therein, Wolters, as well as by the labor claimants, that the Harmonia Mining Company was a corporation, and not a partnership, and nothing further was done in that action. The labor claimants then commenced the action now before us on appeal, in which they make Wolters, the Harmonia Mining Company (a corporation), and Busch, the sheriff who levied the attachment, defendants.

The complaint sets up the foregoing facts and avers "that the plaintiffs have no speedy or adequate remedy at law or by motion in said suit No. 1002 (the attachment suit), and that the Harmonia Mining Company (a corporation) is insolvent." It also alleges: "That these plaintiffs heretofore moved in said case, No. 1002, for an order requiring the aforesaid sheriff to sell said attached property, but that the court on the objection of said J. C. Wolters denied the motion, and that they thereafter moved in said case for permission to file a cross-complaint therein, alleging substantially the same facts as are herein alleged and bringing in said sheriff and said Harmonia Mining Company (a corporation) as new parties, but that this motion, like the other, was on the objection of said J. C. Wolters, denied."

It is also averred that unless restrained Wolters will attempt to dismiss the suit No. 1002 and attempt to release the property from attachment. The prayer of the complaint is, that Wolters be enjoined from the threatened dismissal and release; that the lien of these plaintiffs as preferred creditors under said section 1206 on the attached property, be foreclosed, and said property sold to satisfy the demands of these plaintiffs, together with costs; and that plaintiffs have a deficiency judgment against the corporation, and general relief. The defendants answered, a trial was had, resulting in a judgment denying plaintiffs all relief except a money judgment against the corporation for the aggregate amount due them. Execution was issued upon this judgment and levied upon the same property taken in the attachment suit. Thereupon Wolters moved to quash the execution on the ground that the judgment is void for the reason that the demand sued on by any of the plaintiffs does not equal, but

is less than, three hundred dollars. This motion was granted. The plaintiffs appeal from that part of the judgment denying the foreclosure and equitable relief, and from an order denying them a new trial, and also from the order recalling and quashing the execution.

We think the refusal of the equitable relief was correct. In the first place, section 1206 of the Code of Civil Procedure gives only a preferred claim against the debtor and prescribes the manner of enforcing this claim. It carries with it no lien upon the debtor's property, and says nothing about a lien. When the legislature intends to give a lien, it says so, and prescribes the conditions under which it shall exist, as in the Mechanics' Lien Law and in the statutes giving laborers liens upon certain property. Had the legislature intended to confer a lien in the case under consideration, there was nothing to prevent it from saying so in apt words. It must be, then, that the law confers no lien, and there being no lien there could be no foreclosure.

Nor can the equitable jurisdiction of the court be invoked where the parties have an adequate remedy at law. A plain, speedy, and adequate remedy at law was open to the plaintiffs. When they discovered that the defendant was a corporation and not a partnership, they might have brought attachment suits in the justice's court (their respective claims being under three hundred dollars) and attached all this property as the property not of any partnership but as the property of the corporation. If they had found attachments ahead of theirs against the corporation, they could then have proceeded to enforce their preferred labor claims under the statute; or if the plaintiffs had sought to amend their complaint in the original action against the partnership so as to make the corporation a defendant therein, then also these labor claims could be secured under the statute. The plaintiffs have gone out of their way in asking for relief of an equitable nature when they had an ample remedy at law.

We also think the action of the court proper in quashing the execution and ordering the property released therefrom.

The complaint in this action shows affirmatively that no plaintiff has a claim against the corporation defendant equal to or greater than three hundred dollars. It also shows that

plaintiffs had no joint interest in the aggregate of their claims, but that each had a separate claim, and was entitled only to a separate judgment against the corporation for the amount of his claim. The court, therefore, had no power to enter the joint judgment that it did enter, and, the several claims each being less than three hundred dollars, no jurisdiction of the subject-matter of the action. The judgment was therefore void on the face of the record, and the execution likewise void. And it is immaterial whether the other creditors of the corporation had such interest as would entitle them to move in the premises or not. The court has the power of its own motion to declare that void which clearly appears to be void on the face of the records. (*People v. Greene*, 74 Cal. 400.¹) And the court's action in reference to the execution may be upheld on this theory.

We advise that the order quashing the execution be affirmed, that the judgment appealed from be affirmed as it now stands, and that the order denying a new trial be also affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order quashing the execution is affirmed, and the judgment appealed from is affirmed as it now stands, and the order denying a new trial is also affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

[Sac. No. 1136. Department Two.—December 23, 1903.]

In the Matter of the Estate of CORA V. McKEAG, Deceased.
FRANCES SMITH MOXLEY, Appellant, v.
CHARLES J. TEASS et al., Respondents.

ESTATES OF DECEASED PERSONS—LETTERS OF ADMINISTRATION—RIGHTS OF ADOPTED DAUGHTER.—An adopted daughter of a deceased person who is sole heir to the decedent is entitled to administer upon the estate, and letters of administration were properly granted to her husband upon her request.

¹ 5 Am. St. Rep. 448, and note.

ID.—VALIDITY OF PROCEEDINGS FOR ADOPTION—COLLATERAL ATTACK—CONSENT OF PARENTS—APPEARANCE AT HEARING—RECITAL IN ORDER—PRESUMPTION.—Where the written consent of the daughter and of her father and mother to the adoption were filed, and the adopting parents applied for the order of adoption, and filed their written agreement of adoption, and the adopting order recited that the petitioners and said minor child, "and all persons whose consent is necessary have appeared herein as required by law," the order must be deemed sufficient, upon collateral attack thereupon, and it must be presumed upon such attack that the court did its duty, and found from extrinsic evidence the existence of all jurisdictional facts, and determined whether the presence of the parents of the minor at the hearing was necessary or not, and, in the absence of any finding that it was not necessary, that the court found that the presence of the father was necessary, and required his appearance at the hearing; and the fact of such appearance sufficiently appears upon the face of the order, as against the collateral attack.

ID.—POLICY OF ADOPTION LAWS—REASONABLE CONSTRUCTION TO SUSTAIN PROCEEDINGS.—The policy of adoption laws is to be regarded with favor. Although the proceedings under the statute are not strictly judicial, they call for the exercise of judicial functions; and such a reasonable construction should be given them as will sustain rather than defeat the object they have in view, and will sustain the assumed relationship, particularly as against a collateral attack by strangers to the proceedings, whose only interest is to defeat the relations which the adoptive parents always recognized and never questioned, so that they may succeed to an estate from which, by the very fact of adoption, the adoptive parents intended they should be excluded in favor of the adopted child.

ID.—JURISDICTION OF PROCEEDINGS—EXAMINATION IN COURT—ERROR OF PROCEDURE.—The court in which the adoption proceedings were had having obtained jurisdiction of the parties, the failure of the judge to examine them at the hearing was an error of procedure which cannot affect the validity of the adoption.

ID.—ESTOPPEL OF HEIR CLAIMING UNDER ADOPTIVE MOTHER.—The adoptive mother was estopped in her lifetime from questioning the validity of the adoption proceedings as respects mere irregularities in the method of procedure; and an heir claiming under the adoptive mother, as against the adopted daughter, stands in no better right to attack them than the deceased would have had.

APPEAL from an order of the Superior Court of Shasta County refusing to revoke letters of administration. Edward Sweeney, Judge.

The facts are stated in the opinion of the court.

W. M. Cannon, and Frank Freeman, for Appellant.

McCoy & Gans, for Respondents.

LORIGAN, J.—This is an appeal from an order of the superior court of Shasta County, refusing to revoke letters of administration in the above estate, and the real point involved is as to the validity of certain adoption proceedings.

The respondent Charles J. Teass is the husband of Helen McKeag-Teass, and was appointed administrator of said estate upon the request of his wife, who claimed to be the adopted daughter, and, as such, sole heir of deceased. At the time of the alleged adoption, Mrs. Teass, then Helen Skeels, was a minor, over the age of twelve years, and the daughter of Spencer L. and Anna E. Skeels.

On December 2, 1895, William McKeag and the deceased, Cora V. McKeag, his wife, jointly applied to the judge of the superior court of Shasta County for an order of adoption by them of said child, and filed therewith their written agreement of adoption required by law. The written consent of said minor was likewise filed, together with that of her father and mother consenting to and authorizing the making of such order of adoption.

Thereafter the judge of said superior court made and filed an order for the adoption by said William and Cora V. McKeag of said minor, which order recited, among other things: "That the petitioners and said minor child, and all persons whose consent is necessary, have appeared herein as provided by law, and . . . it is hereby ordered that said petitioners William McKeag and Cora V. McKeag, his wife, adopt said minor child . . . and said minor child shall be treated by them in all respects as their own lawful child should be treated, including the right of inheritance, . . . and shall bear to each other and toward each other the relation and relations of parents . . . and child."

Prior to said adoption, said minor had, for some six or seven years, been living with said William and Cora McKeag, and after said adoption continued to live with them until their death—William McKeag dying a couple of years before his wife. William and Cora V. McKeag had no other children, and a strong feeling of parental love and affection

existed at all times between the adoptive parents and said child, and so continued to the death of the former.

Said Cora V. McKeag died intestate in Shasta County in July, 1901, and after the issuance of letters of administration to said respondent, the appellant, a sister of said deceased, claiming to be one of the heirs at law, petitioned to have the letters issued to respondent revoked, and letters issued to herself, which petition was denied.

Upon the hearing in the lower court, the validity of the adoption proceedings was the sole point in issue, as it is the sole question for determination here.

The appellant claims,—1. That the judge before whom the adoption proceedings were had, acquired no jurisdiction to make the order of adoption, because the father of the minor child did not appear personally before him during any part of the proceedings; and 2. That neither the adopting parents nor the father of the minor, nor the minor herself, were examined by the judge on the hearing, either separately, or at all.

Upon the first point it is insisted that it is not enough for the adoption proceedings to show that the father consented in writing to the adoption of his child, but that the order of adoption should affirmatively show that he was actually present at the hearing upon the petition. We think, however, on this collateral attack, that the fact does sufficiently appear upon the face of the order from the recital therein "that the petitioner and said minor child, *and all persons whose consent is necessary*, have appeared herein as provided by law."

In the *Estate of Camp*, 131 Cal. 470,¹ it is said: "While the proceedings for the adoption of a minor child do not constitute judicial proceedings, and the order of the judge therein is not the judgment of a court, yet under section 227 of the Civil Code, the judge of the superior court has been designated as a tribunal for that purpose, and in the performance of his duties thereunder exercises judicial functions. It is a well-settled rule that when the jurisdiction of an inferior or special tribunal, or its power to act in any particular case, depends upon the existence of a fact which is to be estab-

¹ 62 Am. St. Rep. 371.

lished before it by extrinsic evidence, the determination of that fact by the tribunal cannot be questioned in a collateral attack upon its order. . . . Whether the children had been abandoned by their parents was a jurisdictional fact to be determined by the judge upon the evidence presented to him before he was authorized to entertain the petition for their adoption, and the recital in his order that it appeared to his satisfaction that they had been abandoned by their parents was a determination of this fact which cannot be questioned in a collateral attack upon the order. Otherwise, the existence of this fact and the *status* of the children would be always uncertain, since the evidence might not be the same at all investigations, and might be regarded with different effect by different tribunals, and the adoption be held by one court to have been valid, while another court would hold it to have been of no avail. Whether the parents of the child, in a direct proceeding against the adopting person for the recovery of the persons of the children, would be bound by the determination of the judge, is not involved herein."

So, in the case at bar, it was a jurisdictional fact, to be determined by the judge from extrinsic evidence, whether the consent of the father was necessary to the adoption, and, if so, to require his presence before him at the hearing. While the general rule is, that a child cannot be adopted without the consent of its parents, there are several exceptions to the rule; as, for instance, if either parent has been deprived of civil rights, or adjudged guilty of cruelty or adultery, and for that reason divorced, or adjudged an habitual drunkard, or has abandoned the child. In any of these cases the consent or presence of such parent is unnecessary. Otherwise it is. Upon the appearance before the judge of the persons seeking to adopt the child and the child, he acquires jurisdiction to entertain the petition for adoption, but at this point it is only jurisdiction to preliminarily investigate and determine whether the presence at the hearing of the parents of the minor child is necessary or not.

One parent being present and consenting, it is still incumbent upon the judge to ascertain whether the consent and presence of that parent alone is necessary to the relinquishment of the child, and to confer full jurisdiction to proceed with the hearing and make the order of adoption.

If it should be ascertained upon such inquiry that the child has another parent living who possesses a right to its care, custody, or control, it is the duty of the judge to decline to proceed with the hearing on the petition until the consent and presence of such parent are had; on the other hand, should the inquiry disclose that such parent, if living, comes within any of the exceptions of the statute, the consent or presence of such parent is unnecessary. In all cases it becomes necessary to determine this jurisdictional fact. In the case at bar it must be presumed that the judge properly discharged his official duty, and, in the absence of any express finding that the presence of the father was unnecessary, by reason of coming within any of the exceptions (and the presumption is in favor of the general rule, not of the exception), determined that his presence was necessary, and required it, and in harmony with his written consent the father actually appeared at the hearing, and that the fact of such actual presence is embraced in the finding "That all persons whose consent is necessary have appeared herein as provided by law."

The finding, it is true, is somewhat open to the objection that it is equivocal and uncertain in its language. It might have been more definite. In fact, in the various cases affecting adoption proceedings which have required the attention of this court, much of the difficulty in considering them has arisen from the apparent inattention to the plain provisions of the statute; these provisions are so simple, and so much depends upon substantial compliance with them, particularly as to the future interests of the child, that the simplicity of the one and the paramount interest of the other should command more attention at the hands of the judge called upon to act. While proceedings under the statute are not strictly judicial, they call for the exercise by the judge of judicial functions, and in construing them such a reasonable construction should be given them as will sustain rather than defeat the object they have in view.

There is nothing that can be said against the policy of adoption laws; there is everything that can be said in their favor. Under them, innocent parentless and abandoned children are withdrawn from the charity of public institutions,

and provided with comfortable homes and affectionate foster parents.

Unfortunate children, whose parents, through overwhelming adversity, or the infirmities of their nature, are unable to care and provide for them, are placed in cheerful homes, under the care and control of adoptive parents willing and able to provide for their protection and comfort.

Under the beneficent provisions of these statutes, such children are accorded advantages and opportunities for better moral, intellectual, and material advancement; a measure of happiness is secured to the adoptive parents and the child adopted, under the reciprocal influences of filial and parental affection, and inasmuch as the development of the child into a valuable member of society and an upright citizen depends upon healthy, moral home influences and parental solicitude, to that all-important extent, then, under these laws, are the best interests of society and the state conserved.

Recognizing these good results, courts are more and more inclined to an abandonment of the old rule of strict construction and to place a fair and reasonable construction upon proceedings under the statute, with a view of sustaining the assumed relationship, particularly against a collateral attack by strangers to the proceedings, whose only interest is to defeat the relations which the adoptive parents always recognized and never questioned, so that they may succeed to an estate from which, by the very fact of adoption, the adoptive parents intended they should be excluded in favor of the adopted child.

As to the second point urged by counsel for appellant, that neither the adoptive parents, nor the father of the minor, nor the minor, were examined at the hearing, we think it is without merit.

The court, having obtained jurisdiction of the parties, the failure of the judge to examine these parties was an error of procedure which cannot affect the validity of the adoption. (*In re Johnson*, 98 Cal. 542.) While it was especially held that the examination of a child under twelve years of age was discretionary with the judge, the trend of the decision is to hold that the examination of the other persons appearing before the judge is not absolutely necessary to give effect to

the order of adoption. The court there says: "The essential foundation of the proceeding is the consent of the persons named in the statute, and when this has been given in the presence of the proper judge, and manifested in writing and by the order of such judge, the contract cannot be declared invalid because of some merely technical objection to the manner in which the judge who signed the order of adoption may have discharged his duty in the premises."

Without, however, discussing this point further, we are satisfied that appellant claiming under Cora V. McKeag, the adoptive mother, is estopped as effectually as she would be in her lifetime from questioning the validity of the adoption proceedings—certainly, at least, to the extent that any irregularities in the method of procedure are invoked to disturb them. The deceased in her lifetime could not have questioned them, and appellant stands in no better right to attack them than the deceased would have had.

In *In re Williams*, 102 Cal. 81,¹ this court says: "Undoubtedly, the judge ought, in the orderly and proper discharge of his duty, to conform to this direction of the law (examination of all parties), but his omission to do so would not render the contract absolutely void. The deceased voluntarily entered into the contract of adoption under consideration here, and received in his lifetime the benefits resulting from the relation thus created—the society, affection, and devotion of an adopted daughter—and no principle of law or equity will permit the appellants claiming under him to avail themselves of this technical departure from the direction of the statute, to defeat the rights of respondent growing out of the contract, the validity of which was never disputed by the deceased, and which has been fully performed by all the parties to it."

In *In re Evans*, 106 Cal. 565, the court expresses the same view in the following language: "Various irregularities in the proceedings are urged, but, after these papers were executed before the judge, and this man and this child lived together as father and daughter for ten years and down to the day of his death, it requires more than mere irregularities to brush aside and annul a relationship entered into with

¹ 41 Am. St. Rep. 163.

all honesty of purpose, lived up to for many years, and only severed by the hand of death." To the same effect are *In re Johnson*, 98 Cal. 545; *Estate of Camp*, 131 Cal. 471;¹ *Van Fleet on Collateral Attack*, sec. 408; *Sewell v. Robert*, 115 Mass. 276; *Parsons v. Parsons*, 101 Wis. 83;² *Van Maitre v. Sankey*, 148 Mass. 536;³ *Nugent v. Powell*, 4 Wyo. 201;⁴ and *Appeal of Wolf*, 13 Atl. Rep. 764.

In *Nugent v. Powell*, 4 Wyo. 201,⁴ it is said: "Notwithstanding these proceedings in adoption, the father might at any time since they took place have brought an action for the possession or custody of the child, and no one will contend, or perhaps can successfully contend, that in such case these adoption proceedings would constitute a bar to the father's action, or that they were conclusive upon him. But it does not follow that because the adoption proceedings were not conclusive upon the father, they were not conclusive upon the parties to the proceedings and their privies; on the contrary, we think they are, and so hold."

In the last case above cited—*Appeal of Wolf*—the doctrine is clearly stated as follows, and we set it forth somewhat at length as directly applicable to the case at bar: "Nearly nine years after the decree was entered, and more than one year after the death of her adopted father, his administrator and collateral heirs come into court and ask that this decree of adoption be vacated. They are not here in the interest or on behalf of the innocent subject of adoption, but decidedly against the same. They are either strangers to the adoption, and, therefore, have no standing in court, or they are privies in blood, or in law, and stand in the shoes of Samuel Sankey, through and under whom they claim. Surely, Samuel Sankey, if living, could not be heard in this court questioning its decree made at his solicitation. He invoked the jurisdiction of the court; he asked that the decree of adoption should be made; he got what he desired; and he should not now be allowed to question the means he set in motion. If any wrong was done, Samuel Sankey did it, and neither he nor those who claim under him can be permitted to take advantage of his wrong to the prejudice of an innocent party. On the argument

¹ 82 Am. St. Rep. 371.

² 70 Am. St. Rep. 894.

³ 39 Am. St. Rep. 196.

⁴ 62 Am. St. Rep. 17.

many cases are cited where decrees of distribution have been set aside at the instance or in the interest of the adopted child. But none were cited, nor will any likely ever be found, where such decrees were revoked at the instance of the party who invoked the power of the court and sought and obtained the decree, when such revocation would be to the prejudice of the innocent child."

For the reasons that we have given, and in harmony with the authorities cited, we are satisfied that the finding of the lower court that the adoption proceedings were valid is correct, and that the respondent, as nominee of his wife, the adopted daughter of deceased, was entitled to administer upon the estate, and that the order denying the application of appellant for a revocation of his letters should be, and is, affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[Sac. No. 1141. In Bank.—December 23, 1903.]

L. J. MADDUX, Respondent, v. J. M. WALTHALL, Appellant.

ELECTION—CONTEST FOR PUBLIC OFFICE—POWER OF LEGISLATURE.—Although the public is interested in the legality of elections, and in seeing that offices be filled by eligible citizens properly chosen, yet it is competent for the legislature to authorize any elector to take the proper steps to determine these questions, and the fact that the contesting elector has a personal interest in the result, as claiming the right to the office for himself, cannot affect the validity of the law.

ID.—TRIAL BY JURY—WAIVER.—Without deciding whether trial by jury is proper in an election contest, any right to such trial is waived where no demand therefor was made until after the trial was commenced.

ID.—MARKED BALLOTS—STAMP AFTER WORDS "NO NOMINATION."—Ballots stamped after the words "No nomination" are illegal and void,

as having a distinguishing mark. The number of ballots so marked cannot affect their invalidity; and evidence is not admissible to show that by reason of the number of ballots so marked it ceased to be a distinguishing mark.

ID.—VIOLATION OF PURITY OF ELECTION LAW BY CONTESTANT—INSUFFICIENT DEFENSE.—The court did not err in refusing to allow the contestee to urge in defense that the contestant had violated the Purity of Election Law. That question is to be determined in a separate proceeding for the infliction of the penalties provided therefor.

APPEAL from a judgment of the Superior Court of Stanislaus County. William O. Minor, Judge.

The facts are stated in the opinion of the court.

Dennett & Walthall, E. A. Belcher, and J. C. Needham,
for Appellant.

L. J. Maddux, for Respondent.

HENSHAW, J.—This was an election contest instituted under sections 1111 et seq. of the Code of Civil Procedure. The court rejected the ballots in the senatorial and assembly squares of the Republican ticket containing a cross after the words "No nomination." The result of the recount was, that the contestant received the greater number of legal ballots, and was declared elected. The contestee appeals.

Upon his appeal he urges that the proceeding provided for by the sections of the code above cited is unconstitutional. In substance his argument is, that, as a public office is a public trust, and as the public is interested in the legality of elections, and in determining who shall occupy an office, and as an individual is but a member of the public, he can have no resort to a private action such as this to redress his real or fancied wrongs. Hence it is contended that such an action must be prosecuted by, and on behalf of, and in the name of, the people of the state of California. We are not referred to any authority in support of this contention which seeks to overthrow a procedure which has been upon our books since 1853, and which has been recognized by this court upon numberless occasions. It is undoubtedly true that the public is interested in the legality of elections.

and in seeing that offices are filled by eligible citizens properly chosen. At the same time, however, it is perfectly competent for the legislature to do as it has done in this instance, and authorize any elector to take the proper steps for the determination of these questions. The fact that the contesting elector may have, and frequently has, some especial personal interest by reason of the fact that he claims the right of office for himself does not and cannot militate against the validity of the law.

To the further objection that these sections are unconstitutional because they do not provide for the right of trial by jury, and that the court erred in refusing the contestee a trial by jury in violation of the constitution, it is sufficient to say, that if it be conceded—though it is not hereby decided (see *Kennard v. Louisiana*, 92 U. S. 480)—that a trial by jury in such a proceeding may be had in a proper case, in this particular instance the refusal of the court to grant such a trial was perfectly proper. In the first place, the demand was not made until after the trial had commenced, and, in the second place, as appears by the stipulation of the parties and by the record in the cause, no question of fact was involved which could have been submitted to a jury. This appears from the stipulation of the parties to the effect that, “if the ruling of the court in not counting the ballots with such cross after ‘No nomination’ was error, then the judgment should be reversed, but that, if the court was correct in excluding such ballots, then the contestant received the majority of the remaining ballots.”

There was thus presented, the marking of the ballots being admitted, the legal question as to whether or not the ballots so stamped carried upon their face a distinguishing mark. That such a mark is prohibited and renders the ballot illegal and void, has been repeatedly decided. (*Farnham v. Boland*, 134 Cal. 151; *Salcido v. Roberts*, 136 Cal. 670; *Patterson v. Hanley*, 136 Cal. 265; *People v. Campbell*, 138 Cal. 11; *Taylor v. Bleakely*, 55 Kan. 1.¹) The manner of stamping the ballot is provided by the statute, and is mandatory. (*Tebbe v. Smith*, 108 Cal. 101.²) “No voter shall place any mark upon his ballot by which it may be afterwards identified as

¹ 49 Am. St. Rep. 233, and note. ² 49 Am. St. Rep. 68.

the one voted by him." (Pol. Code, sec. 1215.) The rule is, and has often been declared, that an illegal mark upon the ballot, or a legal mark illegally placed, which may serve as a distinguishing mark, will invalidate the ballot, and that the intent of the voter cannot be shown other than by what appears upon the face of the ballot. (*Rutledge v. Crawford*, 91 Cal. 632;¹ *Lauer v. Estes*, 120 Cal. 652.)

In this case, however, the contestee asked the trial court to admit evidence, and to say that, because of the number of ballots so marked, this admittedly illegal mark did not and could not identify the ballots, and so ceased to be a distinguishing mark. But to do this would result in the absolute destruction of the rule, and leave each case involving this question to be decided, not as a matter of law, but as a discretionary matter resting with the trial judge. Either the rule must be adhered to, that a legal mark illegally placed upon the ballot by a voter, or an illegal mark made by the voter which may serve as a distinguishing mark, invalidates the ballot, as the code declares, or there is no rule whatever touching the matter, and the mandatory provisions of the ballot law are at once annulled.

It is finally urged by the contestee that the court erred in refusing to allow him to allege as part of his defense a violation of the Purity of Election Law upon the part of the contestant. In this the court did not err. An election contest such as this is a special statutory proceeding designed to contest the right of a person "declared elected" to enter into and hold office. (*Austin v. Dick*, 100 Cal. 199.) It was never designed that the contestee might prevent a determination as to his right of office by showing that the contestant himself had violated certain laws and was himself therefore not entitled to the office. The proceeding may be instituted by any elector. The only matters of inquiry for the court are those prescribed in subdivisions 1, 2, 3 and 4 of section 1111 of the Code of Civil Procedure, unless the person "declared elected" by the canvassing board is charged with a violation of provisions of the Purity of Election Law, in which event it may be that the court may hear and determine such charge. That question is not, however, here involved, and we do not de-

¹ 25 Am. St. Rep. 212.

cide it. (See Purity of Election Law, sec. 12; Stats. 1893, p. 19.) By section 1123 it is the duty of the court to declare any other person elected (and this person may be neither the contestant nor the contestee) if the result of the recount should so disclose. If the person so declared elected by the court shall in truth have violated any of the penal provisions of the Purity of Election Law, that is properly a matter for determination in a separate proceeding. These provisions of the Purity of Election Law are highly penal. They are designed, as the name of the law implies, to protect and preserve the purity of the ballot. The punishments meted out for violations of the provisions of these laws are for the most part punishments for felonies. The deprivation of office of a successful candidate who has been guilty of election abuses is but an incident to the punishment which the law imposes.

For the foregoing reasons the judgment appealed from is affirmed.

Van Dyke, J., Angellotti, J., and McFarland, J., concurred.

SHAW, J., concurring.—I concur in the judgment. With respect to the ballots upon which crosses appear in the square or space after the words "No nomination," I concur, because I regard the proposition that such crosses constitute a distinguishing mark as the settled law of this state, under the decisions cited in the main opinion. As the legislature of 1903 changed the form of the ballot so that those words will not appear on the ballots in future elections, the matter ceases to be of sufficient prospective importance to justify further consideration, even if the principle of the cases were considered as unsound.

This proposition being established, there can be no modification of it on the ground that there happens to be so many similarly marked ballots in a single precinct that it is not possible to identify any one of them as the ballot of a particular voter. The principle underlying the decisions referred to must be that the statute is to be considered as declaring each of such marked ballots void, because, as the mark is purposely made, there is an intent presumed by law on the part of each voter, at the time he casts it, to mark it for identification. This presumed intent is not affected, nor can

it be disproved, by showing other facts, necessarily unknown to the voter at the time, which tend to, or actually do, for that purpose make futile the act from which the intent is presumed. Hence, it is not material to show by a display of the ballots after the polls are closed, that so many other voters used the same mark that it failed to afford the means of identification which the law conclusively presumes the voter intended. It is the conclusive presumption of the law as to the intent of the voter by an illegal mark purposely made, and as to the effect of such illegal mark, which renders the ballot invalid, and not the actual intent, or absence of intent, of the voter, nor the actual effect of the mark to give the means of identification.

I do not mean to say, however, that where marks are found on a ballot which, if purposely made, might serve to identify it and make it void, but where the mark itself, or other appearances on the face of the ballot, shows that such mark was made accidentally, or unconsciously, and not with intent to mark or identify the ballot, the voter is to be thereby disfranchised and the ballot so marked declared invalid.

[Sas. No. 997. Department Two.—December 24, 1903.]

H. F. GRUWELL, Appellant, v. JOHN ROCCA, Respondent.

MINING CLAIMS—ACTION TO QUIET TITLE—FINDINGS—SUPPORT OF JUDGMENT—MATTERS OF EVIDENCE—ULTIMATE FACTS.—In an action to quiet title to mining claims, findings that plaintiff is not the owner or entitled to possession of the property, and that since a certain date the defendant has been the owner, in possession, and entitled to the possession of the property, are sufficient to support a judgment for the defendant; and matters of evidence relating to proceedings in the land office, the citizenship of the parties, and other matters, though proper to be considered by the court in reaching the ultimate facts found by the court, are not required to be passed upon in the findings.

Dr.—RIGHT OF PURCHASE UNDER MINING LAWS—CONTEST IN LAND OFFICE—PROVINCE OF STATE COURT.—Where a contest in the land office of the United States of the right to purchase mining property from the federal government under the mining laws is referred to

the state courts to determine the question of "the right of possession," the state court must determine that question by a proceeding authorized by the state laws as though no contest were pending in the land office, and does not concern itself whether or not its judgment can be used in the land office.

ID.—ERRONEOUS PART OF JUDGMENT—EXCESS OF JURISDICTION—MODIFICATION OF JUDGMENT.—A part of the judgment in the superior court, declaring that the defendant is entitled to purchase certain named mining claims from the government of the United States, and to receive a patent therefor, is erroneous and in excess of jurisdiction, and will be stricken from the judgment upon appeal.

APPEAL from a judgment of the Superior Court of Tuolumne County. G. W. Nicol, Judge.

The facts are stated in the opinion.

J. F. Rooney, for Appellant.

The right of possession of a mining claim under the laws of the United States depends upon citizenship, which must be both averred and proved. (*Harris v. Kellogg*, 117 Cal. 488; *Le Doon v. Tesh*, 68 Cal. 44, 48; U. S. Rev. Stats., sec. 2319.)

F. W. Street, for Respondent.

The action was merely an ordinary action to quiet title, and was not brought like *Le Doon v. Tesh*, 68 Cal. 44, under the Revised Statutes of the United States, and citizenship and the proceedings in the land office were not in issue here. (*Quigley v. Gillett*, 101 Cal. 467; *Harris v. Kellogg*, 117 Cal. 484.)

COOPER, C.—This action was brought to quiet plaintiff's title to certain portions of the San Felipe Quartz Mine, in Tuolumne County, and to have a decree that plaintiff is the owner and entitled to the possession thereof. Findings were filed upon which judgment was entered for defendant. This appeal is from the judgment upon the judgment-roll, and the only contention is, that the findings do not support the judgment.

The court found that plaintiff is not the owner nor entitled to the possession of the premises claimed by him; and that

since April, 1882, defendant has been the owner, in the possession, and entitled to the possession of the same. These findings are sufficient to support the judgment. In the pleadings and in the findings there is much surplusage. There are allegations and findings as to a mining location by plaintiff of the land in contest, also of prior locations by one Richeri and of conveyances by Richeri to defendant. There is no issue and no finding as to whether or not defendant is a citizen of the United States. The plaintiff contends that from the findings of fact as to plaintiff's locator and citizenship, and the want of any finding that defendant is a citizen of the United States, the court should have concluded as matter of law that plaintiff is entitled to the possession of the mining claim. There is nothing in the probative facts found inconsistent nor in conflict with the ultimate facts. The court does not find as to whether or not defendant is a citizen of the United States, but we regard the matter as wholly immaterial here. This is not an action under section 2326 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 1430) to determine which of the parties is entitled to purchase the land under the mining laws of the United States. Indeed, Congress could not impose upon the state courts the duty and labor of determining for the land department who is entitled as between conflicting claimants to purchase from the government, nor has it attempted to do so. The section of the Revised Statutes referred to makes it the duty of an adverse claimant to commence proceedings in a court of competent jurisdiction to determine "the question of the right of possession." But this question must be determined by the state courts, by a proceeding authorized by the laws of the state, and not by reason of the Revised Statutes. The laws of our state authorize superior courts to determine adverse claims to land when the parties bring the issue before the court in a proper manner. (*Altosna Q. M. Co. v. Integral Q. M. Co.*, 114 Cal. 100.) The proceedings in the land department, the citizenship of the parties, and other matters may be heard by the trial court for the purpose of determining who is entitled to the possession, but they are only matters of evidence to aid the court in arriving at the ultimate fact. As said by Mr. Justice Temple in the case cited, "The rights of the parties

will be entirely determined by the laws of the United States granting the right to enter upon the mineral lands and to extract metal therefrom, and to acquire title thereto, but the suit must be tried in every respect as though no contest was pending in the land office of the United States in regard to the right to purchase the same." The state court does not concern itself with the question as to whether or not its judgment can be used in the land office. (*Quigley v. Gillett*, 101 Cal. 420; *Mining Co. v. Bullion Mining Co.*, 9 Nev. 240, 4 Saw. 634; Fed. Cas. No. 4989.) We therefore conclude that the ultimate facts being found in favor of the defendant, and the findings not being challenged, that the judgment is correct as to the right of possession, but that part of the judgment and decree which adjudges that "the defendant is entitled to purchase the said Reward, April, and Madison quartz claims from the government of the United States and receive a patent therefor" is in excess of the jurisdiction of the court and void. It is in excess of the jurisdiction of the court, because it attempts to determine a matter which it is the province of the land department of the United States to determine, and further, because it, on its face, determines defendant's right to purchase premises not embraced in this action.

The judgment should be modified by striking the quoted clause therefrom, and as thus modified affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is hereby modified by striking out the quoted clause therefrom, and as thus modified is affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

[Sec. No. 1131. Department Two.—December 24, 1903.]

WILLIAM CALLAWAY, Respondent, v. E. C. WILSON.
Appellant.

PRINCIPAL AND AGENT—FRAUD OF AGENT IN PURCHASE OF LAND—ACTION BY PRINCIPAL FOR DIFFERENCE IN PRICE—EVIDENCE—NONSUIT.
—In an action to recover from the defendant, as plaintiff's agent in the purchase of real estate, the difference between the price paid to the agent for the purchaser, which defendant represented to plaintiff the property would cost, and a less amount paid by defendant to the purchaser for a deed taken in defendant's name, the property having been conveyed by defendant to the plaintiff at the falsely represented price, where the evidence tended to show that defendant was acting as plaintiff's agent, and was chargeable with fraud in the transaction, a motion for a nonsuit was properly denied.

ID.—PRELIMINARY QUESTION AS TO LETTER—PREJUDICIAL ERROR NOT SHOWN.—Where the defendant was merely asked a preliminary question as to whether he could state the contents of a letter written by him, of which he had no copy, which could be answered by "Yes" or "No," and was not asked to state the contents of the letter, and no offer was made to show what its contents were, it does not appear that any prejudicial error was committed in sustaining an objection to the preliminary question.

APPEAL from a judgment of the Superior Court of Butte County and from an order denying a new trial. H M. Albery, Judge presiding.

The facts are stated in the opinion.

Jo D. Sproul, for Appellant.

Carleton Gray, for Respondent.

CHIPMAN, C.—Action to recover from defendant, as plaintiff's agent in the purchase of certain real estate, the difference between the price which defendant represented to plaintiff the property would cost,—namely, \$1,850,—and the price which defendant paid to make the purchase,—namely, \$1,520,—the difference being \$330. The cause was tried by the court without a jury and plaintiff had judgment, from which and from the order denying his motion for a new trial defendant appeals.

The following facts are found by the court: That on May 13, 1901, defendant agreed with plaintiff to procure a thirty days' option to purchase certain land for the sum of \$1,850, receiving from plaintiff at the same time fifty dollars to be paid in securing said option, and to be applied on account of the purchase price if plaintiff elected to purchase; that at the time of entering into said agreement defendant represented to plaintiff that the owner of the land would not take less than \$1,850 for the same; that defendant immediately thereafter went to San Francisco and there secured an option to purchase said land from the owner for \$1,520, and paid to the owner said fifty dollars and took the option in his own name, and thereafter informed plaintiff that he had secured the option on said land for the sum of \$1,850, whereas in fact he had secured said option for \$1,520, and by its terms was to pay the owner \$1,470 in addition to said fifty dollars; that relying on the statement made to him by defendant, the plaintiff then gave defendant the additional sum of \$1,800 and instructed him to purchase the land for plaintiff; that defendant did not show said option to plaintiff, and thereafter defendant paid to the owner \$1,470 and secured in his own name a conveyance of said land, and immediately thereafter,—to wit, June 3, 1901,—conveyed said land to plaintiff; that defendant at no time informed plaintiff that he had secured said option for any sum less than \$1,850, and at the time plaintiff gave defendant the additional \$1,800, as above found, plaintiff believed that said sum, together with the fifty dollars given defendant as above stated, was the true purchase price of said land which he, through defendant, was to pay to the owner; that defendant at all the times mentioned was acting for and on behalf of plaintiff, and was at no time during said transaction acting for the owner of said land, and that plaintiff and defendant were not at any time dealing with each other concerning said land. As conclusions of law, the court found that defendant was the agent of plaintiff, and that it was defendant's duty to purchase said land for plaintiff at the lowest possible price; that defendant was not the agent of the owner; that plaintiff is entitled to the difference between the amount defendant paid for the land and the amount received from plaintiff therefor; that the fact that

defendant took the deed in his own name and afterward conveyed the land to plaintiff did not change the relationship of principal and agent then existing between plaintiff and defendant into that of vendor and vendee. Judgment thereupon passed in favor of plaintiff for \$330, with legal interest from June 3, 1901.

Appellant makes but two points: 1. That his motion for a nonsuit should have been granted; and 2. That the court erred in refusing to permit defendant to testify as to the contents of a certain letter claimed to have been written by him to the owner of the land.

The ground urged in support of the motion for nonsuit is, that the evidence fails to show that defendant was acting as plaintiff's agent, and hence cannot be charged with fraud in the transaction. This view, it is urged, will appear from a careful reading of the evidence. We have given the record such an examination, and are satisfied that there was sufficient evidence to justify the court in denying the motion.

Defendant was called as a witness for plaintiff, and in the course of his examination identified a letter (which was introduced in evidence by plaintiff) received by defendant from the owner of the land, setting forth the terms on which the owner would give an option to purchase. This letter was in reply to one addressed to the owner by defendant. Subsequently, when defendant was testifying in his own behalf, the following proceedings occurred:—

"Q. Have you a copy of the letter you wrote to the French bank (the owner of the land) to which you received the reply introduced in evidence?

"A. No, sir; I have no copy of the letter.

"Q. Can you state in general terms its contents?

"*Mr. Gray* (plaintiff's attorney).—Objection that it is immaterial, irrelevant, and incompetent.

"*The Court*.—Objection sustained.

"*Mr. Sproul* (defendant's attorney).—Exception."

The witness was not asked to state the contents of the letter, but only whether he could do so. He might have answered "Yes" or "No" without prejudice to plaintiff or defendant, and should have been allowed to go that far. Had defendant's counsel shown what the proposed evidence

was, we could then determine its relevancy or competency and whether its exclusion was injurious. As the record stands, we have nothing before us on which to rule.

It is advised that the judgment and order be affirmed.

Smith, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Henshaw, J., Lorigan, J.

[S. F. No. 3526. Department Two.—December 26, 1903.]

In the Matter of the Estate of CHARLES R. POTTER, Deceased. SHERMAN BROS., Appellants, v. JOSEPH POTTER, Administrator, Respondent.

ESTATES OF DECEASED PERSONS—JUDGMENT DISMISSING PETITION—AMENDMENT NUNC PRO TUNC—COSTS—TIME FOR APPEAL.—Where a judgment dismissing a petition against an administrator for the specific performance of a contract of sale made by the decedent was subsequently amended *nunc pro tunc*, so as to tax the costs against the petitioner, an appeal will lie from the judgment as amended within sixty days after the date of the amendment.

ID.—POWER OF COURT AS TO COSTS NOT ASKED—SILENCE OF JUDGMENT—AMENDMENT.—Though the court had discretion as to costs upon the dismissal of such petition, yet where costs were not prayed for in the answer, and the judgment was advisedly silent as to costs, the court had no power at a subsequent time to amend the judgment *nunc pro tunc* so as to include costs not originally contemplated.

ID.—JUDICIAL ERRORS NOT AMENDABLE NUNC PRO TUNC.—The object of entering judgments and decrees as of some previous date is to supply matters of evidence and to rectify clerical misprisions, but not to enable the court to correct judicial errors. If the court has not rendered the judgment that it might or should have rendered, or if it has rendered an imperfect or improper judgment, it has no power to remedy such errors by ordering an amendment *nunc pro tunc* of a proper judgment.

APPEAL from a judgment of the Superior Court of Solano County. S. K. Dougherty, Judge, entering order for

costs *nunc pro tunc*. Emmett Seawell, Judge, refusing to vacate order *nunc pro tunc*.

The facts are stated in the opinion of the court.

Haskell & Denny, and J. T. Campbell, for Appellants.

Lyman Green, and F. A. Meyer, for Respondent.

HENSHAW, J.—A petition was filed by the appellants in the matter of the estate of the deceased, seeking specific performance of a contract for the sale and conveyance of land made by deceased with them. The proceedings were under sections 1597 and 1598 of the Code of Civil Procedure. The administrator made answer, controverting the alleged right to compel the conveyance, and concluded by a prayer that the petitioners take nothing by their petition. After hearing, the court dismissed the petition without prejudice, as contemplated by section 1602 of the Code of Civil Procedure. The decree was entered accordingly. This decree was entered upon the eleventh day of June, 1902. Some months thereafter the administrator filed his "notice of a motion for judgment *nunc pro tunc*," by which he proposed to ask the court to amend its judgment by adding thereto a judgment for costs against the petitioners, stating that the motion would be made upon the ground "that said administrator inadvertently failed on said eleventh day of June, to ask for said judgment, and upon the ground that said court at any time has the right to enter said judgment." The court did order its judgment amended *nunc pro tunc*, and taxed the costs against the petitioners in the sum of \$158. From this judgment as amended they appeal. Various other orders were made by the court, and a contention arises between the parties as to whether or not these orders are appealable. But without entering into a minute examination and discussion of them, it is sufficient here to say that, giving fullest weight to the action of the trial court in the premises, it amounted to a modification and amendment of its judgment. From the judgment so amended and modified an appeal taken within sixty days will lie. (*Estate of Corwin*, 61 Cal. 160; *Stuttmeister v. Superior Court*, 71 Cal. 322.)

We are of the opinion that under section 1720 of the Code of Civil Procedure it was within the power of the court to have awarded costs upon the determination of this proceeding. It is true that costs follow the final determination or judgment, as an incident thereto, but the petitioners had invoked this proceeding, had failed therein, and the result was a judgment or decree of dismissal. That judgment or decree did not finally determine their right to a conveyance, but it did finally determine their rights in that particular proceeding, and within the discretion of the court, as contemplated by section 1720, the expenses of the contest against the estate which they had invoked could justly have been taxed against them. Upon the other hand, it was equally competent for the court to have ordered each party to the contest to bear and pay his own costs, or what in law would have been the equivalent, to have made no order whatsoever concerning costs. This last is precisely what the court did. Its decree was silent upon the matter. Moreover, the administrator in his answer did not ask for costs. The question thus presented is whether such a judgment so entered may thereafter be amended by the court so as to include costs.

This, under the circumstances shown, we think the court had not the power to do. Undoubtedly the ground of motion upon the part of the administrator afforded no legal reason nor legal excuse for the court's action. The fact that a party litigant inadvertently fails to ask for a judgment, confers neither power upon the court to order nor right upon the litigant to seek a modification of such judgment as the court may have advisedly given. There remains the only other question whether or not the court has, as asserted in the motion and here argued, the inherent power at any time to enter such a judgment. We think it has not such power. The object of entering judgments and decrees as of some previous date is to supply matters of evidence and to rectify clerical misprisions, but not to enable the court to correct judicial errors. If the court has not rendered a judgment that it might or should have rendered, or if it has rendered an imperfect or improper judgment, it has no power to remedy such errors by ordering an amendment *nunc pro tunc* of a proper judgment. (Freeman on

Judgments, secs. 61, 68; *Morrison v. Dapman*, 3 Cal. 255; *In re Skerrett*, 80 Cal. 63; *Leonis v. Leffingwell*, 126 Cal. 372; *Cowdery v. London etc. Bank*, 139 Cal. 298.¹)

The amendment to the judgment in the case at bar is within the limitation and prohibition of this principle. It was the attempt by the court not to correct a clerical misprision, not to supply omitted evidentiary matter, but at a later date to enter a judgment which originally it had never contemplated entering, though at the time of giving the original judgment it might have caused it to be entered.

The appeal from so much of the judgment as awards costs against appellant is therefore sustained, with directions to the trial court to deny the administrator's application for a modification of the judgment so as to allow him costs, and to strike from the judgment the award of costs against appellants herein.

Lorigan, J., and McFarland, J., concurred.

[L. A. No. 1389. Department Two.—December 26, 1903.]

E. R. SANCHEZ, Respondent, v. EUGENE FORDYCE,
and THOMAS RUIZ, Appellants.

ELECTION OF CONSTABLES—COUNTY GOVERNMENT ACT—CONSTITUTIONAL LAW.—The County Government Act of 1901, providing that "in townships having a population of less than six thousand there shall be but one justice of the peace and one constable," is constitutional. The amended sections of the act were republished as amended, and this was a compliance with section 24 of article IV of the constitution; and the act is general and uniform in its provisions, under section 5 of article II of the constitution.

ID.—VALIDITY OF ELECTION—IMPROPER PROCLAMATION—IMPROPER BALLOTS.—The election for one constable is valid in a township of less than six thousand, notwithstanding the proclamation of the board of supervisors improperly called for the election of two constables. The statute gave notice of the time and place of the election; and notwithstanding only a small portion of the voters voted for only one constable, the court properly rejected all ballots containing the names of two constables in such township.

¹96 Am. St. Rep. 115, and note.

APPEAL from a judgment of the Superior Court of Ventura County. D. K. Trask, Judge presiding.

The facts are stated in the opinion.

W. E. Shepherd, H. L. Poplin, and Blackstock & Orr, for Appellants.

M. J. Rogers, and Thomas O. Toland, for Respondent.

COOPER, C.—Election contest. Prior to the general election held in November, 1902, the Democratic and Republican parties each nominated two candidates for the office of constable of Ventura Township in Ventura County, and the board of supervisors issued an election proclamation calling for the election of two constables for said township.

Respondent was nominated by petition. In the contest the ballots were recounted, and the court found that respondent received the greatest number of legal votes, and judgment was accordingly entered in his favor. The court refused to count any ballot cast on which more than one person's name appeared for the said office of constable.

Appellants state that the record presents two questions of law which they ask to have decided,—1. Was the township entitled to elect two constables? and 2. If the township was not entitled to two constables, was there any valid election? It is provided in the County Government Act of 1901 (sec. 56, Stats. 1901, p. 686) that "in townships having a population less than six thousand there shall be but one justice of the peace and one constable."

The undisputed evidence shows that Ventura Township contained at the time of said election less than four thousand population. Appellants do not controvert the fact that the County Government Act, if valid, gives only one constable to said township, but they claim that the said act is void because it was amendatory of the act of 1897 and was not republished as amended. The amended sections of the act were republished as amended, and this was a compliance with section 24 of article IV of the constitution. The act was held constitutional in the late case of *Beach v. Von Detten*, 139 Cal. 462, followed in *Rea v. Von Detten* (73 Pac. 1131), and

Davidson v. Von Detten, 139 Cal. 467. We see no reason to depart from the rule there laid down, nor to repeat the reasons as therein stated. The additional point is here made that, as section 5 of article XI of the constitution authorizes the legislature to "regulate the compensation of all such officers [county officers] in proportion to duties, and for this purpose may classify the counties by population," therefore it cannot directly or indirectly classify the counties for any other purpose than the one purpose of regulating the compensation of county officers. We agree with appellants' counsel that under this provision of the constitution the legislature can classify counties but for the one purpose of regulating the compensation of county officers. It has been so held by this court. (*Pratt v. Browne*, 135 Cal. 650.) It cannot classify townships for the purpose of regulating compensation. But the said section of article XI expressly confers upon the legislature the power, by general and uniform laws, to provide for the election or appointment of such township officers as convenience may require. It has, by section 56 of the County Government Act, done this very thing. It has said that in all townships of the state having a population of less than six thousand, only one constable shall be elected. It has thus determined that public convenience does not require more than one constable for a township having less than six thousand population. This determination was a matter of legislative discretion. It has nothing to do with the compensation of constables. It is not a classification of townships for the purpose of regulating the compensation of constables, but a mere provision as to the number of township officers of a certain kind. It is general and uniform, because it applies equally to every township in the state. It is founded upon a reason which might rationally be held to justify the provision. It was said in *McDonald v. Canniff*, 99 Cal. 391: "It is not necessary that a law shall affect all the people of the state in order that it may be general, or that a statute concerning procedure shall be applicable to every action that may be brought in the courts of the state. A statute which affects all the individuals of a class is a general law, while one which relates to particular persons or things of a class is special. A statute regulating the rights of married women, or which affects all mining corporations, or confers rights

upon a municipal corporation of a certain class, or places restrictions upon all foreign corporations, is a general law." In *People v. Lodi High School Dist.*, 124 Cal. 699, it was held that an act authorizing school districts having a population of one thousand or more to establish and maintain a high school in such district was constitutional and not special legislation. It was there said: "The law is general in its operation, for it applies alike to all cities, incorporated towns, and school districts having a population of one thousand inhabitants or more, and it is general in its purpose, for it gives to all inhabitants of the state similarly situated equal opportunity to avail themselves of the benefits to be derived from these schools." It is said that there is no reason why a township containing a population of five thousand nine hundred and ninety-nine shall be entitled to only one constable, while a township containing six thousand is entitled to two. If we were to adopt the above rule, we would destroy the power of the legislature to classify counties, the power to classify school districts in proportion to population for the purpose of assigning teachers, and the power to make many other provisions which the public convenience may require. The legislature has provided for several classes of cities according to population, and not for the purpose of regulating the compensation of the officers thereof, and the power to so classify has never been questioned. It is not easy to determine the exact instant of time when the day ceases and night begins, but for this reason laws are not declared void which prescribe a different penalty for crimes committed in the nighttime from those committed in the daytime.

As to the second proposition, the election was valid, notwithstanding the proclamation of the board of supervisors called for the election of two constables. The statutes gave notice of the time and place of election and the officer to be elected. (Pol. Code, sec. 1041; County Government Act, secs. 56, 58.) It is said in Cooley on Constitutional Limitations (6th ed., p. 759): "When both the time and place of an election are prescribed by law, every voter has a right to take notice of the law, and to deposit his ballot at the time and place appointed, notwithstanding the officer, whose duty it is to give notice of the election, has failed in that duty. The notice to be thus given is only additional to that which the

statute gives, and is prescribed for the purpose of greater publicity; but the right to hold the election comes from the statute, and not from the official notice. It has, therefore, been frequently held that when a vacancy exists in an office which the law requires shall be filled at the next general election, the time and place of which are fixed, and that notice of the general election shall also specify the vacancy to be filled, an election at that time and place to fill the vacancy will be valid, notwithstanding the notice is not given; and such election cannot be defeated by showing that a small portion only of the electors were actually aware of the vacancy, or cast their votes to fill it." (See, also, Paine on Elections, sec. 384; *People v. Brenham*, 3 Cal. 487; *Carson v. McPhetridge*, 15 Ind. 327; *Dickey v. Hurlburt*, 5 Cal. 344; *State v. Jones*, 19 Ind. 356;¹ *Jones v. Gridley*, 20 Kan. 584; *Berry v. McCollough*, 94 Ky. 247; *People v. Cowles*, 13 N. Y. 356.) It was said in *People v. Brenham*, 3 Cal. 487: "The time and place of the election being fixed by law, it may have been the duty of the common council to give notice thereof; and should they fail to do so, or to perform any other duty required, prior to the election, a writ of *mandamus* might issue from the courts commanding them to discharge their duty; but this would not afford immediate relief; and it ought not to be in the power of incumbents in office to prevent the election of their successors, at the time and place prescribed by law, by neglect on their part."

We therefore conclude that the law required only one constable to be elected in the township, and that the election was valid. It is advised that the judgment be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

McFarland, J., Lorigan, J., Henshaw, J

¹ 81 Am. Dec. 403.

[S. F. No. 3490. Department Two.—December 26, 1903.]

In the Matter of the Estate of JOHN S. HITTELL, Deceased.
THEODORE H. HITTELL et al., Appellants, v. ANNA
P. GREER, Respondent.

ESTATES OF DECEASED PERSONS—DISTRIBUTION—CONSTRUCTION OF WILL—TENANCY IN COMMON OF DEVISEES—PRIOR DEATH OF DEVISEE—LAPSE OF BEQUEST.—Under the will of a deceased person bequeathing all of his real and personal property to two devisees named, no joint tenancy is created or devise made to a class, with any right of survivorship, but the will creates a tenancy in common in the devisees; and where one of the devisees named died prior to the death of the testator the bequest to such devisee lapsed, and the half-interest devised to her should be distributed to the heirs at law of the testator.

APPEAL from a decree of the Superior Court of the City and County of San Francisco distributing the estate of a deceased person. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Theodore H. Hittell, for Appellants.

The devise vested an estate in common. (Civ. Code, sec. 1350.) The devise was to two persons named, and created a tenancy in common. No general terms were used creating a class. (*Estate of Morrison*, 138 Cal. 401; Page on Wills, p. 625, secs. 541, 542, 543; *Bill v. Payne*, 62 Conn. 140; *Rockwell v. Bradshaw*, 67 Conn. 8; *Frost v. Courtis*, 167 Mass. 251; *Dildine v. Dildine*, 32 N. J. Eq. 78; *Moffett v. Elmen-dorf*, 152 N. Y. 475.¹) Where the devise is to persons named, the death of one of them before the death of the testator gives no right of survivorship, but the devise lapses. (*Saxton v. Webber*, 83 Wis. 617; *Estate of Kimberly*, 150 N. Y. 90; *Sohier v. Inches*, 12 Gray, 385; *Savage v. Burnham*, 17 N. Y. 561, 575.)

Smith & Pringle, for Anna P. Greer, Respondent.

A class disposition is shown by the will to be the intention of the testator, which must control. (*Hoppock v. Tucker*,

¹ 57 Am. St. Rep. 529.

59 N. Y. 202; *Crececius v. Horst*, 9 Mo. App. 51; *Jackson v. Roberts*, 14 Gray, 546; *Page v. Gilbert*, 32 Hun, 301; *Anderson v. Parsons*, 4 Me. 486; *Wood v. Boardman*, 148 Mass. 331; *Schaffer v. Kettell*, 14 Allen, 528; *Stedman v. Priest*, 103 Mass. 293; *Dove v. Johnson*, 141 Mass. 287; *Swallow v. Swallow*, 166 Mass. 240; *Bolles v. Smith*, 39 Conn. 218; *Chase v. Peckham*, 17 R. I. 385; *Le Breton v. Cook*, 107 Cal. 410.)

McFARLAND, J.—The deceased died testate, and this appeal is by heirs at law from a decree of distribution by which the whole of the estate is distributed to the respondent, Anna P. Greer, a devisee named in the will. The contention of appellants is, that only one undivided one half of the property of the deceased went to the respondent under the will, and that the other half was undisposed of and vested in the heirs at law, and this contention must be sustained.

There was before the trial court a photographic copy of the will, and it is in the record on appeal. It is contended by appellants that a certain word in the will is "daughter" (in the singular), and by respondent that it is "daughters" (in the plural). The court below did not expressly find whether the word is singular or plural. The only evidence on the point—outside of what the will itself shows—is the testimony of one Ames, who was called by respondent as an expert on handwriting. He testified that the word "was as a physical fact written 'daughter' in the singular," and then went out of the realm of expert testimony to say that, taking the context, the grammatical construction of the sentence, etc., "he was of the opinion that it was intended to mean daughters." The court below must have treated the word as plural; for otherwise there would be no pretense for the theory upon which the decree rests. But as, in our opinion, the contention of appellants must be maintained whether the word be held to be singular or plural, we will not pass on that question, and for the purpose of this opinion will take it to be "daughters," and so write it in the part of the will herein-after copied.

The will, omitting the parts which are merely formal, or not material here, is as follows: "I bequeath all my real and personal property to Anna P. Greer and Mary M. Greer with

whom I live at this house 1216 Hyde St., and whom I regard and treat as my adopted daughters. I give nothing to my brother Theodore because I suppose him to be rich; I give nothing to any of his children,—Catherine, Charles or Frank, because he can provide for them; I give nothing to my sister Mary H. Killinger or to her children, Charles, Flora and John, for a similar reason; and nothing to my niece Mary H. Kingbury because I suppose her husband can provide well for her."

The will was made September 8, 1897, and the testator died March 9, 1901. Mary M. Greer, mentioned in the will, died on February 23, 1900,—more than a year before the death of the testator.

There were no findings or evidence of facts as to the circumstances under which the will was made that give any extrinsic aid to its interpretation. The will itself shows that at the time of its execution the testator and the devisees were living together at a certain place; and the only additional evidence as to that matter was, that they had been so living together for "some ten years." It also appears that Mary was "about forty years old," and that Anna was "older"; that they were sisters; that the testator continued to live with Anna until his death; that he and they were unmarried people, and that there "was no relationship of blood or marriage between said testator and either said Anna P. Greer or Mary M. Greer." These are the only facts not shown by the will, and they throw no light upon its meaning. What it means must therefore be gathered from what appears upon its face.

The first apparent and obvious impression which a reading of the instrument leaves on the mind is, that the will makes a devise to two persons, Anna and Mary, as tenants in common; that if they had both outlived the testator they would have taken as tenants in common, and if, afterwards, one of them had died, her estate would have gone to her heirs or devisees, and not to the other cotenant; and that, upon the death of Mary during the life of the testator the testamentary disposition to her failed or lapsed—in which event it went to the heirs at law of the testator. Our code expressly provides that "A devise or legacy given to more than one person vests in them as owners in common" (Civ. Code, sec. 1350); that

"An interest in common is one owned by several persons, not in joint ownership or partnership" (Civ. Code, sec. 685); that "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy" (Civ. Code, sec. 683); and by section 686 of the Civil Code, that every interest created in favor of several persons is an interest in common, unless a joint interest created as provided in section 683 or held in partnership. By the will in question here no joint tenancy, or right of survivorship of any character, is declared or intimated. It creates a clear tenancy in common.

Counsel for respondent, as we understand them, do not seriously contend that the will creates the strict legal relation of joint tenancy. But they contend that their client gets the whole estate, not as a surviving joint tenant, but as the remaining person of a "class." Their contention is, that the devise was to Anna and Mary as a class, and that the case comes within the rule that where there is a devise to a class, those of the class who are in existence at the death of the testator take the whole estate. We think that this position is wholly untenable. The devise in the case at bar is simply to two named individuals, and there is no designation of a "class" within the meaning given that word by the authorities. The statement that the devisees were persons with whom he lived and treated as his adopted daughters is of no significance, except perhaps as a reason given for his bounty. A common instance of a devise to a class is where a testator gives property, generally to the "children" of a certain person, without naming them,—as to "the children of my brother John"; and in such a case it is held that the devise is to such children of John as will be in existence at the time of the testator's death. There are cases where in the devise the individuals and the class are both named,—as, for instance, where it is "Charles, James, and Robert, children of my brother John,"—and in such cases courts have had some difficulty in determining whether the devise was to the individuals named or to the class. In such a case, the general rule is, that the persons named take as individuals and not as a class, unless some other clause of the will, or some evidence outside of it calls for a different construction. The result of the author-

ities—and counsel for each side have cited a large number of them—is correctly stated in Page on Wills (sec. 543) as follows: “Where there is a gift to a number of persons who are indicated by name, and also further described by reference to the class to which they belong, the gift is held *prima facie* to be a distributive gift and not a gift to a class”; and, after citations in his notes, he says: “In such cases if one of the beneficiaries dies before the testator, there is, therefore, no right of survivorship to the other named beneficiaries.” Indeed, counsel for respondent admit that “a denominative gift to members of a class, without more, is not a gift to the class.” Therefore, in the case at bar, even if a class had been named, the gift would have been to the individuals, because there is nothing in the other parts of the will, or in any extrinsic evidence, showing a different intent, and there are no operative words creating any right of survivorship. But, as before stated, there was no class named; and this fact is an insurmountable obstacle in the way of respondent’s contention.

Although the will has no operative words to create anything other than a tenancy in common, it is contended that a right of survivorship should be judicially forced into it in order to carry out the intent of the testator; because, it is said, the reference in the will by the testator to his relatives, who were his heirs at law, showed that he did not intend that they should have any of his property, while if there be no survivorship one half of his estate would go to such heirs. We see no merit in this contention. The will was made in view of conditions existing at the time of its execution; and as he gave all of his property to the two women, both of them living, of course he intended at that time and under existing circumstances that his heirs should take nothing. It was quite natural that, having given nothing to any of his blood relatives, he should state his reasons for his conduct in that respect. These reasons did not intimate any hostility to his relations; they were simply that he supposed them to be well provided for financially. As in the case of innumerable wills, the testator did not anticipate changed conditions, and did not provide for the event of the death during his lifetime of one of the named devisees, which he could easily have done, if he so desired, by giving the property to them or to the survivor of them. What his actual intent may have been after

the conditions were changed by the death of Mary we have no means of knowing, except from the fact that he allowed the will to stand as originally executed. He may have thought that one half of his estate would be sufficient for the wants of the remaining woman. At all events, we must apply the law to the will as it reads, and to the fact of the death of Mary before that of the testator, and thus applying it, the conclusion clearly follows that the living devisee, Anna, took one undivided half of the estate, and that the other half vested in the heirs at law.

The decree of distribution appealed from is reversed.

Lorigan, J., and Henshaw, J., concurred.

[S. F. No. 3525. Department Two—December 28, 1903.]

CHARLES S. CURRAN, Respondent, v. A. P. HOLLAND,
Appellant.

CONTRACT TO NEGOTIATE LOAN—ACTION FOR COMMISSION—LIABILITY OF UNDISCLOSED PRINCIPAL—PAROL EVIDENCE.—In an action to recover a commission for negotiating a loan upon certain real estate against a defendant who signed merely as a witness to a contract executed in the name of another person, parol evidence is admissible to show that the defendant is an undisclosed principal, for whose benefit the loan was to be negotiated for the purpose of purchasing the real estate described, and that the party signing the contract had no interest in the matter, and that he was defendant's agent, and signed it at defendant's request, for the purpose of concealing the name of the defendant as principal.

13.—FORM OF CONTRACT IMMATERIAL.—In order to charge the real principal, it is always competent, in whatever form a contract is executed by an agent, to ascertain by evidence *dehors* the instrument who is the principal, whether the contract purports to be that of an agent, or is made in the name of the agent as principal; and it is immaterial that the principal signed the instrument as a witness in order to disguise his real character as principal.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. S. P. Hall, Judge.

The facts are stated in the opinion.

Sam Bell McKee, for Appellant.

A. Everett Ball, for Respondent.

COOPER, C.—Action to recover commission for procuring a loan under an express contract. Findings were filed and judgment entered in favor of plaintiff. This appeal is from the judgment and an order denying defendant a new trial.

It is claimed that the court erred in allowing parol evidence for the purpose of showing that defendant was the principal in the written agreement as to plaintiff's commission.

The agreement was as follows:—

"This is to certify that I, David Gregor, hereby authorize Charles S. Curran to negotiate for me a loan upon my property at the northeast corner of Broadway and Tenth Streets, Broadway, Oakland, Alameda County, Cal., for the sum of \$70,000, for which I agree to pay him the sum of \$500 as commission, and I hereby authorize the mortgagee to pay the same to said Curran out of said loan and said Curran's receipt therefor shall be good.

"Witness my hand this 14th day of January, 1902.

"DAVID GREGOR.

"Witness: A. P. HOLLAND."

There is no question but that plaintiff performed the services and procured a party ready and willing to make the loan, nor is it questioned that David Gregor is liable by the express words of the agreement. The testimony outside the writing showed that defendant was the real party in interest, and that Gregor signed as agent or for the purpose of keeping secret the name of defendant. This was done at the defendant's request. Defendant's own version of the transaction is as follows: "I had an arrangement with Mr. Mott as to the obtaining of a loan regarding this property. Some time in December I went to Mr. Mott and asked him if he could procure a loan of \$75,000 on property on Tenth and Broadway. I made it a condition of the loan that I should not make the application, nor should I sign the mortgage papers, and I

told him that if he succeeded in getting the loan, and the deal went through, I explained to him that I had not yet got the property, I didn't at that time have it, if the deal went through I would pay him \$500 . . . so Gregor and Judge went up to Curran's office, which was the first time I had ever been there. . . . I didn't state or acknowledge that I was the principal in this matter. I had very good reasons for not doing so. . . . I know that the agreement that was signed was for money that was to be used by me for the purchase of this property. . . . When we went into Curran's office we had a general conversation that might have been had under circumstances of that sort. We talked to Mr. Curran about the loan. . . . The money they were trying to borrow was for my use to purchase this property, and I presume I was subsequently notified that they had obtained the loan of \$65,000 flat and \$5,000 in installments, and it was satisfactory to me."

The evidence was clearly admissible. The services were performed for defendant. He was the party interested and who desired to use the money in buying property. Gregor does not appear to have had the remotest interest in the matter. Defendant wanted it fixed so that he would not be known in it. He said he "had very good reasons for not doing so."

If Gregor is responsible, it would be a great injustice to hold him liable for services performed by plaintiff for defendant, when Gregor appears to have acted merely for the accommodation of defendant. If he is not responsible, it would be an injustice to plaintiff to deprive him of the right to recover from the real party in interest. It is said in Reinhard on Agency (sec. 223): "While extrinsic evidence, except in the instances heretofore pointed out, will not generally be received to vary or contradict the contents of a written instrument, such evidence is always admissible to charge with liability an undisclosed principal, *or one who though disclosed is not named in the instrument.*" (See, also, Reinhard on Agency, secs. 303, 328, and cases cited; Story on Agency, sec. 466a.) The supreme court of the United States, in *Ford v. Williams*, 21 How. 289, said: "The contract of the agent is the contract of the principal, and he

may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction." In *Exchange Bank v. Hubbard*, 62 Fed. Rep. 116, it is said: "In order to charge the real principal it is always competent, in whatever form a parol or written contract is executed by an agent, to ascertain by evidence *dehors* the instrument who is the principal, whether it purports to be the contract of an agent or is made in the name of the agent as principal." (See, also, *Higgins v. Senior*, 8 Mees. & W. 834; *Byington v. Simpson*, 134 Mass. 169;¹ *Coleman v. First Nat. Bank*, 53 N. Y. 393;² *Briggs v. Partridge*, 64 N. Y. 357.³) Nor does it make any difference in this case that defendant signed the agreement as a witness. He was none the less the real principal. It was his intention by so doing to disguise his real character, as he did not want to be known in the matter. As to the contention that the commission was to be paid only on condition that the deal went through, there is at most a conflict in the evidence. It does not appear that plaintiff ever made such agreement, and the writing certainly makes no such condition. The court below heard the evidence and saw the witnesses, and as its finding is based upon sufficient evidence to support it, we cannot disturb it.

The nonsuit was properly denied.

The evidence sustains the findings complained of, and it would serve no useful purpose to discuss it at greater length.

The judgment and order should be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

¹ 45 Am. Rep. 314.

² 21 Am. Rep. 617.

³ 8 Am. Rep. 711.

[Ses. No. 795. In Bank.—December 28, 1903.]

HENRY MILLER, Appellant, v. C. E. GRUNSKY, Respondent.

STATE PATENT—SWAMP LANDS—BOUNDARY—LOCATION OF RANCHO—SURVEYS—UNITED STATES MAP—REFERENCE TO MAP OF STATE SURVEY—EVIDENCE.—In determining the boundary of a state patent for swamp and overflowed lands, a map of the government survey of the township, not referred to in the state patent nor shown to have been used or examined by the state officials, is not conclusive as to the location of the eastern boundary of a rancho therein referred to, as being much farther east than as indicated in the state patent, especially where the rancho is not disclosed on the government map to have been marked by any inclosure or visible monuments. Evidence of the application for the state patent showing the description of the land applied for, and of the map of the state survey of the swamp land referred to in the patent, was admissible; and it appearing that the parties acted with reference to that map, it controls any other and inconsistent particulars in the description in case of ambiguous or equivocal calls, under subdivision 6 of section 2077 of the Code of Civil Procedure.

ID.—EFFECT OF STATE PATENT—CONSTRUCTION—CONFLICTING CALLS.—

A patent is conclusive between the parties and their privies against any collateral attack; but before it concludes anything it must be construed and its meaning determined, and conflicting calls therein are to be reconciled upon the same principles and by the same rules that govern the construction of other deeds of conveyance.

ID.—EARLIER STATE SURVEYS—MISTAKE IN FINAL CALL FOR RANCHO—

VISIBLE MONUMENTS—CHANGE IN SURVEY.—Earlier state surveys for the same swamp lands, of which the survey for the state patent was a recompilation, made before the township plat was approved in the federal land office, showing the visible monuments first erected to mark the eastern line of the rancho, according to the first survey thereof for a patent, were properly admitted to show the origin of the description in the state survey and patent, and to explain a mistake in the final call for the rancho therein, as compared with the final survey of the rancho as patented, and as shown on the township map.

ID.—EFFECT OF PRIOR SURVEY—SUBSEQUENT APPLICATION.—Where state

swamp lands applied for have been previously surveyed, the law does not require a resurvey in the field upon a subsequent application to purchase.

ID.—TOWNSHIP MAP AT DATE OF STATE PATENT—CALL FOR RANCHO IN

PATENT—EXCEPTIONS TO RULE AS TO MONUMENTS.—A call for the same rancho in the state patent, which was then shown on the

township map, to be so located as to give a quantity of swamp land in excess of the state survey of one hundred and seventy-one acres, not paid for, does not show that the rancho was at the date of the patent a monument which inflexibly controls courses, distances, and quantity. This never was an absolute and inflexible rule; but calls for monuments have been made to yield to other calls to effectuate the intention of the parties. The rule, with its exceptions and modifications, is embodied in section 2077 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of Sacramento County. A. P. Catlin, Judge.

The facts are stated in the opinion of the court.

Mastick, Van Fleet & Mastick, for Appellant.

The patent includes the land in controversy, the call for the Orestimba Rancho being a call for a monument, which must control courses and distances. (Code Civ. Proc., sec. 2077, subds. 1, 2; *Adair v. White*, 85 Cal. 313; *Colton v. Seavey*, 22 Cal. 496, 502; *Central Irr. Dist. v. De Lappe*, 79 Cal. 351, 355; *Castro v. Barry*, 79 Cal. 443, 448; *Powers v. Jackson*, 50 Cal. 429; *Graybeal v. Powers*, 76 N. C. 66, 69; *James v. Brooks*, 6 Heisk. 151, 157; *Campbell v. Branch*, 4 Jones (N. C.), 313; *Corn v. McCrary*, 3 Jones (N. C.), 496, 499; *Mendenhall v. Paris*, 84 Cal. 193; *Bartlett Land Co. v. Saunders*, 103 U. S. 316; *Worsham v. Chisnon*, (Tex. Civ. App.) 28 S. W. Rep. 905.) A boundary of a tract of land called for must be construed to mean its true boundary, and not what the parties suppose it to be. (*Umbarger v. Chaboya*, 49 Cal. 525, 538; *Maxey v. Thurman*, 50 Cal. 321; *Cleveland v. Flagg*, 4 Cush. 76; *Martiz v. Hartley*, 4 Watts, 261; *Wiswell v. Marston*, 54 Mo. 270; *Northrop v. Sumney*, 27 Barb. 196; *Johnson v. Farlow*, 11 Ind. 199.) Evidence contradicting the description in the state patent was not admissible, it being conclusive. (*Smelting Co. v. Kemp*, 104 U. S. 636; *Irvine v. Tarbat*, 105 Cal. 237, 242; *Adair v. White*, 85 Cal. 313; *Chiple v. Farris*, 45 Cal. 527, 538-540; *Brewer v. Houston*, 58 Cal. 345; *O'Connor v. Frasher*, 56 Cal. 499, 501; *Dreyfus v. Badger*, 108 Cal. 58, 69.)

Stanton L. Carter, for Respondent.

The general intent must control in construing patents. (*More v. Massini*, 37 Cal. 432; *Serrano v. Rawson*, 47 Cal. 55.) The patent refers to the survey and plat, and makes it a part of it. (*Vance v. Fore*, 24 Cal. 444; *Ferris v. Coover*, 10 Cal. 622; *Hudson v. Irwin*, 50 Cal. 450; *Serrano v. Rawson*, 47 Cal. 55; *Black v. Sprague*, 54 Cal. 272; *Cornwall v. Culver*, 16 Cal. 424; *Chapman v. Polack*, 70 Cal. 487; *Kenebeck Purchase v. Tiffany*, 1 Greenl. 219.¹) The rule that monuments will control courses and distances is not inflexible, and the plain intention must control. (*White v. Luning*, 93 U. S. 528; *Heaton v. Hodges*, 30 Am. Dec. 740, note; *Irving v. Cunningham*, 58 Cal. 308; *Payne v. English*, 79 Cal. 546; *Higinbotham v. Stoddard*, 72 N. Y. 94; *Buffalo etc. Ry. Co. v. Stigeler*, 61 N. Y. 348; *Winans v. Cheney*, 55 Cal. 569.)

BEATTY, C. J.—Plaintiff sues to quiet his title to the west twenty chains of section 31 and of that part of section 30 lying south of the San Joaquin River in a certain township in Merced County. Defendant disclaims as to the east six and a half chains of the premises described in the complaint, but asserts title to the remainder, so that the tract in dispute is the west thirteen and a half chains of section 31, and of that part of section 30 south of the river. The land is swamp and overflowed, and part of the grant of the United States to the state of California. Each of the parties claims under the state,—plaintiff under a patent issued in December, 1872, defendant under a certificate of purchase issued in 1887. If the land in dispute was conveyed by the patent, the plaintiff has the title; otherwise, it belongs to the defendant. The trial court found for the defendant and entered judgment accordingly. Plaintiff appeals from the judgment upon the ground that the calls of the patent establish his title conclusively, and that the court erred in admitting over his objection incompetent evidence to explain, to vary, and to contradict the patent.

The evidence so objected to consisted principally of the plats and field-notes of official surveys made by the county surveyor of Merced County as a basis for the issuance of the patent under which plaintiff claims. These plats and field-

¹ 10 Am. Dec. 60.

notes were introduced for the purpose of aiding the court in determining which of two conflicting calls in the patent should prevail. The description in the patent, so far as material, reads as follows: "Survey No. 267 Swamp and Overflowed Lands, Merced County, township No. 7 south, range No. 10 east, Mount Diablo meridian: sections Nos. 19, 20, 28, 29, 30, 31, 32, and 33, portions of said sections, and more particularly described in field-notes of said survey, as follows: Beginning at the southeast corner of the southwest quarter of section thirty-three (33) in township seven (7) south, range ten (10) east, Mt. Diablo meridian, thence west 40.00 chs., thence north 20.00 chs., thence west 20.00 chs., thence north 40.00 chs., thence west 60.00 chs., thence south 20.00 chs., thence west 40.00 chs., thence south 20.00 chs., thence west 20.00 chs., thence south 20.00 chs., *thence west 6.50 chs. to the Orestimba Ranch, thence N. 0 degrees 20 minutes, E. 126.50 chs., to the San Joaquin River.*" The remaining calls, which meander the river eastwardly to a designated point, and thence south to the place of beginning, may for the present be disregarded.

A careful comparison of this description with the government township as defined by the public laws of the United States, of which we take judicial notice, will demonstrate the fact that it does not include in terms any portion of the west 13.50 chains of sections 30 and 31—the tract in controversy. It will be seen that it carries the southern boundary from the point of beginning, by various courses, to the southeast corner of the southwest quarter of the southwest quarter of section 31, which, if the township is of the size prescribed by law, we know is just twenty chains east of the southwest corner of the section and of the township. From this point it runs west only 6.50 chains (to the Orestimba Rancho), and thence north twenty minutes east 126.50 chains to the river. Now, as to the call for the Orestimba Rancho, which, it is contended by appellant, controls absolutely, and by an inflexible rule, all inconsistent calls (for courses, distances, and quantity), it is to be observed that we can know nothing, judicially, of its location. Looking to the patent alone, we would be bound to assume that a line or corner of the rancho is to be found at a point 6.50 chains west of the southwest corner of the southwest quarter of the southwest quarter of section 31 (this point

is hereinafter referred to as "the point noted"), for there is where the description in the patent places it, and it is quite consistent with every law and public record of which we can take judicial notice, that the northeast corner of the rancho may coincide with that point. This fact was thoroughly understood by plaintiff, and accordingly he did not in the trial court rest his case upon his patent alone. If he had done so, he must inevitably have been nonsuited. To make any case at all it was necessary for him to introduce evidence *aliunde* the patent to show that the Orestimba Rancho had an existence, and that it was located more than 6.50 chains west of the point noted. The evidence which he introduced for this purpose was a duly certified copy of the official plat of the United States survey of the township, upon the margin of which in the blank space west of the township line appear the words "Orestimba Rancho." Conceding that this evidence was competent and sufficient to show that there was a tract known as the Orestimba Rancho, the eastern boundary of which coincided with the western boundary of sections 30 and 31, it did not prove such facts as of any earlier date than July 26, 1870, the date of the official approval of the plat, and this date it will be found is material. Nor did this evidence show that the Orestimba Rancho—wherever located—was marked by any inclosure or visible monument whatever. In short, nothing was shown by this evidence except the naked fact that at the date of plaintiff's patent there was a map of the township on file in the office of some federal official (the surveyor-general or registrar of the local land office), upon which the Orestimba Rancho was platted on the west of the township—i. e., 20 chains instead of 6.50 chains west of the point noted. This map is not referred to in the patent, and there is no evidence or ground to presume that it was used or examined by any of our state officials concerned in the preparation and issuance of the patent. Considering the character of this evidence offered by plaintiff for the purpose of locating the Orestimba Rancho twenty chains instead of 6.50 chains west of the point noted, thereby producing an ambiguity of description where none appeared before, and all for the purpose of controlling the terms of the patent, it seems singularly inconsistent for him now to contend that the court erred in admitting and considering evi-

dence of the same character when introduced by the defendant, for the purpose of showing that on the maps actually used by our state officials, and referred to in the patent, the eastern boundary of the Orestimba Rancho was located where the call placed it,—i. e., 6.50 chains west of the point noted.

Before stating the particulars of the evidence which plaintiff contends was erroneously admitted over his objections, it may be well to call attention to the fact that the sale of state lands is regulated by statute. When plaintiff's application to purchase was made, in October, 1868, the statute in force was an act passed in April, 1868,—a general revision of previous acts regulating the sale of state lands. (Stats. 1867-1868, p. 507.) It contains detailed and minute regulations regarding applications to purchase, and all the steps leading up to the issuance of the patent. For the sale of swamp land the process in brief was as follows: The applicant was required to file with the surveyor of the county where the land was situate an affidavit containing, among other things, a description of the land he desired to purchase, whereupon it became the duty of the surveyor to make and record (except when surveys had already been made) a survey of the land applied for, and to complete and forward to the surveyor-general duplicate copies of such "*survey, plat and field-notes*," together with the application to purchase. If the surveyor-general approved the survey, he issued to the applicant a certificate of his approval, upon presentation of which to the county treasurer, the purchase money (one dollar per acre) was accepted and receipted for. Upon proof of payment the surveyor-general certified all the facts to the governor and secretary of state, who signed and sealed a patent containing, among other recitals, one to the effect that the "lands hereinafter described have been duly and properly surveyed in accordance with law." This recital, in itself, would be sufficient to connect the description in the patent with the plat and field-notes constituting a part of the records of the county surveyor's and surveyor-general's offices; but it will be seen from that portion of the description above quoted from this patent, that it makes direct reference to "Survey No. 267, Swamp and Overflowed Lands." This reference to the survey is necessarily a reference to the plat which is an essential part of it, and thereby the descrip-

tion contained in the patent is brought within the operation of subdivision 6 of section 2077 of the Code of Civil Procedure, prescribing the rules for construing the description of lands. That subdivision reads as follows:—

“When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise, the map is subordinate to other definite and ascertained particulars.”

This rule, of course, applies to ambiguous descriptions,—descriptions requiring construction on account of false, conflicting or equivocal calls,—and is peculiarly applicable and absolutely controlling in this case. For, as has been shown, the officers charged with the duty of preparing, executing, and issuing patents of this character—the surveyor-general, governor, and secretary of state—have nothing to guide them in describing the land except the field-notes and plat returned by the county surveyor, together with the application to purchase. They must necessarily refer to the plat in describing the tract conveyed, and in this case they have actually done so. The plat, therefore, by the express terms of the code rule, “controls” other and inconsistent particulars in the description, and necessarily determines which of two inconsistent calls must give way whenever it confirms one of them and conflicts with the other. The court, therefore, did not err in admitting plaintiff’s application to purchase and the approved surveys referred to in the patent. Nor was it prejudicial error, if error at all, to admit the prior surveys, made for other parties, of these same lands. Their certificates of purchase had been forfeited (presumably for non-payment) and Miller’s application was to purchase the lands formerly surveyed for them. The lands having been previously surveyed, the law did not require a resurvey in the field, and presumably the survey accompanying Miller’s application was compiled from the *data* in the surveyor’s office, consisting of the plats and field-notes of the former survey. At all events, there is an exact correspondence between the earlier and later surveys and plats, so far as they affect the question before us, and if the survey made for Miller was properly admitted, the admission of the others did him no harm, unless he was injured by the additional light they threw on the

origin of the mistaken call for the Orestimba Rancho. These earlier surveys—of which the survey for Miller was a mere recompilation—were made in 1865, five years before the government plat of the township was approved,—five years, that is to say, before the Orestimba Rancho was located west of the township line according to any evidence that had been introduced in the case at the time when they were offered. They showed that at the time they were made the eastern boundary of the Orestimba Rancho was plainly marked by the posts and mounds of a government survey 6.50 chains west of the point noted, and it was so delineated on the plat of the survey. This fact was subsequently explained by evidence that the rancho had been twice surveyed—once in 1859, and, upon the rejection of that survey, again in 1861. The latter survey—how long after its date does not appear—was finally patented, and then no doubt correctly marked on the township plat at some date prior to its approval in 1870. At the time of the state survey, however, the monuments first erected to mark the boundary of the rancho were still standing,—some of them, at least,—and this fact explains the call for the Orestimba Rancho at 6.50 chains west of the point noted. The principle upon which the ruling admitting this evidence may be sustained is illustrated by the decision in *Irving v. Cunningham*, 58 Cal. 306. A deed contained a call for a line running two hundred varas to a creek (*arroyito*). There was no creek upon the course of that line nearer than five hundred varas, and the contention was that the natural visible monument must prevail over the call for distance. But it appeared that there was a small gully, at about the distance of two hundred varas, in which water ran in rainy weather. It was held that the grantor was more likely to have called this gully a creek than to have been so badly mistaken as to the distance, and the call for distance prevailed. So here it not only appears that the agents of the state might have been mistaken as to the boundary of the rancho, but that they were mistaken, and were led into their mistake by the visible monuments of a former boundary. Appellant would have us entirely disregard this natural and excusable mistake, with the consequence of more than trebling the call for

distance, and also of violating other important calls of the patent. For, if we extend his southern boundary to the township line, it results in increasing the length of the western line running to the river, changes the courses and distances of the meandering lines along the river from the northwest corner of the survey, and adds one hundred and seventy-one acres to the quantity of land contained in the survey, as returned and approved, and this one hundred and seventy-one acres is land which is sold by the acre, and which has never been paid for.

Further discussion of this point is perhaps unnecessary, for if the admission of survey 267 was not error,—as it clearly was not,—and if the plat constituting an essential part of that survey proves, as it does, that all parties to this patent understood that the Orestimba Rancho was only 6.50 chains west of the point noted, the admission of other evidence to show how they came to be mistaken, though it may have been superfluous, and even incompetent, could not possibly have been prejudicial.

The proposition advanced by appellant, that a patent issued by the state is conclusive as to all matters therein contained, and that extrinsic evidence is not admissible to impeach, vary, or even explain it, etc., if accepted to its full extent, would, as we have seen, put him out of court, for his patent not only does not include the land in controversy, but by a description which, read in connection with the law, is exact and definite and complete in itself, clearly excludes it. But qualifying the proposition as it must be qualified, it may be said that the respondent does not controvert it, and we certainly do not question it. A patent is no doubt conclusive between the parties and their privies against any collateral attack, but before it concludes anything it must be construed and its meaning determined, and when it contains conflicting calls they are to be reconciled upon the same principles and by the same rules that govern the construction of other deeds of conveyance. This proposition is as vital to appellant's contention as to that of the respondent. The whole difference between them consists in the different rule of construction

for which they contend. Appellant claiming that the Orestimba Rancho, as platted on the township map, was, at the date of the patent, a monument, insists that the absolute and inflexible rule of law requires all conflicting calls for distance, etc., to give way to the call for the rancho.

But this was never an absolute and inflexible rule. On the contrary, it has always been subject to exceptions and qualifications of various kinds, and the books are full of cases in which the call for visible monuments has been made to yield to other calls in order to carry out the true intention of the parties to conveyances of lands. And our statute (Code Civ. Proc., sec. 2077) has adopted the rule with all its exceptions and qualifications. It is true that, among other rules prescribed by this section of the code, it is provided in subdivision 2 that when permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount; but this, like every other rule embraced in the section, is subject to the qualification contained in the first clause, that they control only when there are no other sufficient circumstances to determine a doubtful construction, and it is further subject to the rule prescribed by the sixth subdivision, that a map referred to in the deed, and with reference to which the parties acted, *controls* other particulars. In view of this statutory rule, it is hardly necessary to quote the decisions, but this court has more than once resorted to an accompanying map for the purpose of construing a deed. In *Serrano v. Rawson*, 47 Cal. 55, the court said: "In determining the location, the plat of the survey, which is a part of the patent, is often entitled to as much, and perhaps to more, weight than the courses and distances. (*Vance v. Fore*, 24 Cal. 435.) In all cases of conflicting descriptions, the object of the court is to ascertain the intention of the parties, and the entire description contained in the instrument should be resorted to for the purpose of ascertaining the intention."

Numerous decisions here and elsewhere might be quoted to the same effect, but to do so would unnecessarily extend this opinion.

Appellant cites a number of cases to the proposition that when a boundary-line is called for it means the true boundary of the tract, and not what the parties may have supposed the lines to be. In every one of these cases the boundary-line was the only call; there was no conflicting call corresponding to what the parties supposed to be the true boundary; there was no survey, and no map or plat; no reference to any line marked by a fence or other visible monument.

There was some other evidence admitted over appellant's objection, but the rulings of the court were correct, except perhaps in admitting the alleged protest of appellant against the issuance of a certificate of purchase to the defendant. We do not see how that evidence could have been considered relevant, but it was certainly harmless.

The judgment is affirmed.

Angellotti, J., and Lorigan, J., concurred.

SHAW, J.—I concur in the foregoing opinion of the chief justice, and also in the concurring opinion of Mr. Justice Van Dyke.

VAN DYKE, J., concurring.—I concur. It is quite true, as claimed by the appellant, that a patent issued by the United States or the state under provisions of law for the disposal of public land is conclusive as to all the antecedent acts required by law to authorize the issuing of the patent, and that the patent cannot be collaterally attacked by showing that any such acts were not complied with. The evidence here in question, however, was not offered by the defendant for the purpose of impeaching, contradicting, or varying the patent, but to aid the court in reconciling the inconsistent calls in the description of the premises conveyed, so as to arrive at the true meaning of the instrument. It is conceded that there is an error in the description, and the question is as to which one of the conflicting calls controls. The appellant contends that the call "to the Orestimba Rancho" constitutes a designation of a monument which controls in the description over the distance, course, and quantity given. The rule governing the construction of descriptive parts of

a conveyance has been carried into our codes. It is declared that when the construction is doubtful, and there are no other sufficient circumstances to determine it, and that there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be considered by the first-mentioned particular. That when permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either lines, angles, or surfaces, the boundaries or monuments are paramount. When the description refers to a map, and that reference is inconsistent with other particulars it controls them if it appears that the parties acted with reference to the map. (Code Civ. Proc., sec. 2077, subs. 1, 2, 6.) And it is further provided that for the proper construction of an instrument the circumstances under which it was made, including the situation of the subject of the instrument and all the parties to it, may also be shown, so that the judge may be placed in the position of those whose language he is to interpret. (Code Civ. Proc., sec. 1860.) The reason why monuments, as a general thing, in the determination of boundaries, control courses and distances is, that they are less liable to mistakes. But this rule is not inflexible; it ceases with the reason for it, as when the monuments referred to are not known and visible objects on the ground. Grants or conveyances generally are to be interpreted in like manner as written contracts, and should be so interpreted as to give effect to the mutual intention of the parties at the time of the contract or conveyance. The patent in this case recites that it appears by the certificate of the register of the state land office (giving the date and number), that the tracts of swamp and overflowed lands thereafter described have been duly and properly surveyed in accordance with law, and full payment made to the state for the same, and more particularly described in the field-notes of said survey, as follows, etc.,—then giving the description by courses and distances,—containing, as stated, 1,878.26 acres. But to carry the western boundary to the westerly line of the township and the easterly line of the Orestimba Rancho would require twenty chains instead of six and a half, and would embrace one hundred and seventy one acres more than stated in the patent. Parties to a con-

veyance are supposed to be on the land or acquainted with the land conveyed, and to have noticed permanent objects constituting the boundary referred to in the description of the property conveyed. Judge Sanderson, in *Walsh v. Hill*, 38 Cal. 487, speaking on this question of the descriptive parts in a conveyance, says: "In conclusion, upon this branch of the case, we deem it proper to say, that in the construction of written instruments we have never derived much aid from the technical rules of the books. The only rule of much value—one which is frequently shadowed forth, but seldom, if ever, expressly stated in the books—is to place ourselves as near as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it." It does not appear that there is any monument or object on the ground at the west line of the township and the east line of the Orestimba Rancho, as finally located, but that the same is an imaginary line. It is different, therefore, from a case where there is a permanent object or monument on the ground, like a river, or stream, or point of rocks, or known tree, or anything of the kind. There is no reason, therefore, why the call "to the Orestimba Rancho" should control all the other parts of the description inconsistent with it,—to wit, courses, distances, and quantity of land conveyed. In *Pico v. Coleman*, 47 Cal. 65, it is said: "In construing a deed, all its parts must be consulted, and it must be read in the light of surrounding circumstances, and the intention of the parties arrived at in this way." In *Serrano v. Rawson*, 47 Cal. 55, the court says: "In determining the location, the plat of the survey, which is part of the patent, is often entitled to as much, and perhaps to more, weight than the courses and distances. In all cases of conflicting description, the object of the court is to ascertain the intention of the parties, and the entire description contained in the instrument should be resorted to for the purpose of ascertaining the intention. Courts will give effect to every part of the description, if possible; but if this cannot be done, they reject that which is repugnant to the general intent of the instrument." And it is also the rule in the interpretation of contracts or conveyances that where uncertainty exists in the contract as between a public officer or body, as such, and a private party, it is presumed all un-

certainty was caused by the private party. (Civ. Code, sec. 1654.) In this case it cannot be presumed that the state, or its officers, intended to convey by patent to the plaintiff one hundred and seventy-one acres more than he paid for, and any mistake in the description which would result in that is presumed to have been caused by the grantee, and not so intended by the grantor. The plaintiff applied to purchase "a certain tract of swamp and overflowed land in Merced County, lying and situate on the left bank of the San Joaquin River, being the lands surveyed for William Wilson, R. M. Wilson, Noah Stitts, N. B. Eldred, and William Miles, in township 7 south, range 10 east, base and meridian of Mount Diablo." In the field-notes of the survey for William Wilson, the tract of land bordering on the premises in controversy, it is stated by the surveyor that there was "a well preserved cor. of Orestimba Rancho found 40 chains north, 20 minutes east of the S. E. cor. of the Rancho." The plat of the survey in question shows a mound at the corner mentioned, which is made the southwest corner of the land so surveyed, and a line from this to the San Joaquin River, as indicated on said map, leaves a strip of land between that and the township line (being the land in controversy), which is marked on said map as part of the Orestimba Rancho. It is quite reasonable to suppose, therefore, that the designation "to the Orestimba Rancho" in the patent was intended to refer to this line from the mound to the river, as indicated by the survey for Wilson. This would reconcile the various calls in the description of the land conveyed. In view of the discrepancy in question, it was entirely proper to admit in evidence the application of the plaintiff to purchase the land, as well as the surveys of the parties from whom he purchased, as they would enable the court to determine which of the calls was erroneous.

McFarland, J., and Henshaw, J., dissented, and adhered to the opinion delivered in Department.

The following is the opinion of Department Two rendered on the 27th of November, 1901, and adhered to by Justices Henshaw and McFarland:—

HENSHAW, J.—This action was to quiet title to a strip of land in the county of Merced. The strip of land in dispute was the west thirteen and a half chains of sections 30 and 31 in a certain township. The land was swamp and overflowed land, and title thereto was vested in the state under the Swamp Land Act. Plaintiff claimed title under a patent issued to him by the state in December, 1873, while defendant's claim is based upon a certificate of purchase dated in 1887. Plaintiff's patent was for 1878 acres, described by courses and distances. After carrying the boundary to a certain point, the next and disputed course and call is "thence west 6.50 chains to the Orestimba Rancho, thence," etc. As shown by the township plat this easterly line of the Orestimba Rancho, is coincident with the westerly township line, and in order to reach that line the course should be twenty chains instead of six and a half chains. Defendant contends that the distance and course of six and a half chains so named in the patent must control the call to the Orestimba Rancho line, and that there is thus excluded from the patent the strip of land thirteen and a half chains in width, ownership of which is claimed by both parties hereto. The court, under objection and exception of plaintiff, admitted certain evidence offered by defendant in support of his contention. This evidence consisted of former applications by other parties, with the surveys attached thereto, and the application made by the plaintiff to the surveyor-general, on which defendant insists that plaintiff's patent was issued. The field-notes of the survey were admitted with the application. The evidence shows that the approved official survey of the Orestimba Rancho, upon which patent was issued, was made in 1861. The west boundary of the township plat is shown by the plat itself to be coincident with the easterly boundary of the Orestimba Rancho (so far as affects the land here in question). This west boundary was surveyed by the United States in 1859, and the map of the township was approved on July 26, 1870. The patent to plaintiff was issued December 5, 1873, after these approved official surveys of the Orestimba Rancho and the westerly line of the township. The patent to plaintiff, then, is to be construed with such light as may be thrown upon it by these earlier approved surveys.

other hand can it be limited, by showing that the decree comprised a greater or less area than the survey. Nor can the claimant . . . make out title to lands not conveyed by the patent, by the production of the proceedings which culminated in the patent. The patent, while it remains in force, conclusively determines what lands the claimant was entitled to under his claim and the decree of confirmation. The claimant can neither reform the patent nor show that it is in any respect incorrect." In *Brewster v. Houston*, 58 Cal. 345, the contention was the exact opposite of the one in the case at bar. Plaintiff deraigned title under a state patent, which described the land as survey No. 433. The court, against defendant's objection, admitted evidence that survey No. 433 was a resurvey of survey No. 126, and so admitted survey No. 126. In that survey the first call read, "running thence east 38.35 chains *to Old River.*" If the latter words were to be read as part of the description, the plaintiff was entitled to recover, but otherwise not; and plaintiff's claim there was, that the italicized words had been omitted from the patent by mistake, just as in this case it is insisted that the call "*to the Orestimba Rancho*" was inserted by mistake. This court confirming a judgment of nonsuit said: "If a mistake was made in failing to insert a description in the patent, we cannot see how it can be corrected in this action." So here we say that if a mistake was made by inserting an erroneous call in the patent, we fail to see how it can be corrected upon this collateral attack.

Therefore, without regard to the sufficiency of the admitted evidence to prove what it is contended by respondent that it did prove, we hold that its admission was erroneous, and the judgment appealed from is reversed and the cause remanded.

[Sac. No. 971. Department Two.—December 29, 1903.]

**WILLIAM J. ARKLE, Appellant, v. ESTELLE F. ARKLE
BEEDIE et al., Respondents.**

**TRUST—PROPERTY DISTRIBUTED UNDER WIFE'S WILL—PURCHASE WITH
COMMUNITY FUNDS—GIFT TO WIFE—SUPPORT OF FINDINGS.**—In an
action by a husband to enforce a trust in property distributed to a
daughter under the wife's will, on the ground that it was common
property, findings supported by sufficient evidence that the property
was paid for with community funds, with the wife's knowledge and
consent, for the express purpose on the husband's part of making
the property a gift to her, and that he directed the deed thereof
to be made to her alone, as her separate property, which was done,
and that from the date of the purchase until her death they both
treated it as her separate property, establish the case against the
husband and for the daughter.

ID.—DECLARATION OF HOMESTEAD BY HUSBAND.—The property being the
separate property of the wife, the attempt of the husband to declare
it as a homestead without her consent was void.

APPEAL from a judgment of the Superior Court of Tu-
lare County. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

Charles G. Lamberson, and Cole & Cole, for Appellant.

The presumption that the property was community prop-
erty, from being paid for with community funds, cannot be
overcome by a mere preponderance of evidence, but only by
evidence beyond reasonable doubt. (*In re Buckley*, 69 Cal.
1; *Meyer v. Kinzer*, 12 Cal. 248;¹ *Pizley v. Huggins*, 15 Cal.
128; *Ramsdell v. Fuller*, 28 Cal. 38;² *Schuyler v. Broughton*,
70 Cal. 282; *Tolman v. Smith*, 85 Cal. 282; *Jordan v. Fay*,
98 Cal. 264; *Gwynn v. Dierrssen*, 101 Cal. 563; *Lewis v.*
Burns, 122 Cal. 358.)

E. O. Larkins, and William W. Cross, for Respondents.

The consent of the husband that the conveyance should be
made to the wife as her separate property, operated as a gift,
and made it her separate property. (*Higgins v. Higgins*, 46

Cal. 263; *Heney v. Pesoli*, 109 Cal. 60; *Read v. Rahm*, 65 Cal. 344.) Appellant was concluded by the decree of distribution of the wife's separate estate under her will. (*Cunha v. Hughes*, 122 Cal. 111;¹ *Williams v. Marx*, 124 Cal. 24; *McKenzie v. Budd*, 125 Cal. 602; *Seymour v. McAvoy*, 121 Cal. 444; Civ. Code, secs. 1666, 1908; *Matter of Trust of Trescony*, 119 Cal. 570; *Good v. Montgomery*, 119 Cal. 558;² *Crew v. Pratt*, 119 Cal. 149; *Jewell v. Pierce*, 120 Cal. 82.)

LORIGAN, J.—Plaintiff and Anna L. Arkle, deceased, were husband and wife, the defendant Estelle F. Beedie, being their daughter. The deed to the property in controversy here, consisting of a house and lot in Visalia, was taken in the name of the wife on April 7, 1885, and on October 27, 1889, the husband, without the consent of his wife, made and recorded a declaration of homestead thereon. In 1896 said Anna L. Arkle died testate, and by her will devised the premises to the defendant, Estelle F. Beedie, making her also executrix of said will. After due proceedings said property was, on January 8, 1897, distributed to said defendant.

This action was brought in 1900 by plaintiff to obtain a decree that the legal title to the premises was held by said defendant under said decree of distribution in trust for him, and to require a conveyance from her.

The principal question involved in the case is whether the property in controversy was the separate property of Anna L. Arkle, deceased, or was it community property?

The court found that while the purchase price of the property was paid by the plaintiff from community funds, still it was done with the knowledge and consent of his wife, and with the intent and for the express purpose on plaintiff's part of making a gift of it to her; that he directed the agent of the parties of whom it was purchased to have the conveyance drawn to her alone, for the purpose of vesting title to it in her, as her separate property, and that she and plaintiff, from the date of the purchase until her death, treated it as her separate property.

Appellant attacks this finding, and insists that the evidence does not justify it.

¹ 68 Am. St. Rep. 27.

² 63 Am. St. Rep. 145.

The only evidence of what transpired at the time when the purchase of the property was actually made and the deed executed was, that of plaintiff and one D. K. Zumwalt, who negotiated the sale. Their testimony on all essential points is radically in conflict. The plaintiff testified that he spoke to his wife about purchasing the property, and they put in a bid for it with Mr. Zumwalt, the agent; that he did not remember what conversation he had with the latter about drawing the conveyance, but "might have said to him that 'I wanted that property for her as a home, or something of that kind,' " but that in fact he objected to her taking the deed in her name, and consented only because she wished it, and promised him that he should have the control over it.

The witness Zumwalt testified that Mrs. Arkle signed a bid for the property, paid the money, and that plaintiff instructed him to have it conveyed to her as her separate property, and it was so conveyed.

If this was the only evidence in the case, yet, as it is conflicting, that fact precludes us from reviewing the finding based upon it. But, while it is all the evidence relating to what transpired at the time the purchase was actually made, there is additional evidence in the record which throws light upon the transaction and supports the claim that plaintiff intended to, and did, have the conveyance of the premises made to his wife as her separate property. His conduct and declarations at the times when the subject of ownership of the property arose confirm this view. It was shown that he repeatedly stated that the property belonged to his wife; he knew she claimed it as her own, and received the rents thereof; that when endeavoring to obtain a loan he asserted he had no interest in it, and that it belonged entirely to her; and he placed the homestead on it because she threatened to give a portion of the lot to her parents, and he thereby intended to hamper her in making such transfer; he knew prior to her death that his wife had made a will disposing of it in favor of their daughter, and during the settlement of the estate told the attorney who had the matter in charge that he waived any homestead claim and wanted the property to go to defendant, and he knew it was distributed accordingly. These are about all the pertinent facts of the case, and, without commenting on them, because they speak for themselves,

we are satisfied the court was warranted in finding from them that the conveyance of the property was intended as a gift to the wife, and operated to vest it in her as her separate property. (*Higgins v. Higgins*, 46 Cal. 261; *Heney v. Pesoli*, 109 Cal. 60.)

It being her separate property, the attempt of the husband to declare it a homestead, without her consent, was void (Civ. Code, sec. 1239), and by the will and under the decree of distribution in the estate of Anna L. Arkle, deceased, the title to the premises passed to the defendant.

There is no other point in the case which merits attention, and the order denying plaintiff's motion for a new trial is affirmed.

McFarland, J., and Henshaw, J., concurred.

[S. F. No. 2845. Department Two.—December 29, 1903.]

F. R. BENSON et al., Respondents, v. W. L. BUNTING,
Appellant.

SALE UNDER FORECLOSURE—ACTION TO REDEEM—EXPIRATION OF STATUTORY PERIOD—LAW OF CASE—PROOF OF SUFFICIENT COMPLAINT.—In an action to redeem from a foreclosure sale, after the time for statutory redemption had expired, before the offer to redeem had been made, where the complaint was adjudged sufficient upon a former appeal, the right of the plaintiffs to redeem, upon proof of the material averments of the complaint, is the settled law of the case.

1D.—OFFER TO REDEEM—DENIAL OF RIGHT—FINDINGS—OMISSION TO FIND OFFER.—Where the complaint alleged an offer to redeem at a certain time, and also alleged that the defendant procured a deed at the commissioner's sale under foreclosure, and ever since has claimed to be the owner of the premises, free from any right of redemption in the plaintiffs, where the offer was put in issue, but the latter averment was admitted and found to be true, it was unnecessary for the court to find in addition that plaintiffs had performed the vain act of offering to do what the defendant denied them the right to do.

ID.—CLAIM FOR TAXES—OFFSET OF RENTAL VALUE.—It was proper for the court in fixing the amount to be paid for redemption by the plaintiffs to allow an offset of the rental value of the premises while in defendant's possession.

ID.—IMPROVEMENTS MADE AFTER SUIT TO REDEEM.—The defendant was properly refused the value of improvements made after the suit was commenced to redeem the property, and after defendant knew that the plaintiffs denied his ownership or right to the premises, and knew that he got into possession against the consent of, and in hostility to, the claims of the plaintiffs for redemption.

ID.—INVALID STREET ASSESSMENT.—The defendant was properly disallowed the amount of an invalid street assessment against the land, which the court found to be void, as being an assessment against too much land.

ID.—INTEREST ALLOWED FOR REDEMPTION.—Where the court allowed the statutory rate of two per cent per month during the six-months statutory period for redemption, and thereafter the legal rate of seven per cent per annum, the defendant cannot claim that two per cent per month should be allowed until the time of actual redemption, and has no just reason to complain as to the amount of interest allowed after his repudiation of the right of plaintiffs to redeem.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The main facts are stated in the opinion of the court, rendered upon the former appeal, in 127 Cal. 532. Further facts are stated in the opinion of the court upon the present appeal.

Edward C. Harrison, for Appellant.

Ben B. Haskell, and William B. Sharp, for Respondents.

McFARLAND, J.—This is an action to redeem certain real property from a sale made to defendant on the foreclosure of a mortgage. Judgment went for plaintiffs, and defendant appeals from the judgment and from an order denying his motion for a new trial.

The case was here once before, and is reported in *Benson v. Bunting*, 127 Cal. 532;¹ and as the nature of the action is quite fully stated in the opinion rendered on the former ap-

peal, there is no necessity for a general statement of it here. That appeal was from a judgment in favor of defendant following the sustaining of a demurrer to the complaint, and the judgment was reversed—the court holding that the complaint was sufficient. It was there decided that, on account of certain alleged acts and conduct of the parties, the plaintiffs were entitled to redeem, notwithstanding the fact that the statutory period of redemption had expired before the offer to redeem had been made; and, therefore, their right to redeem upon proof of the material averments of the complaint is the settled law of the case, and need not be here discussed.

After the *remittitur* went down the case was tried by the court without a jury, and certain findings were made. Some of the material findings are attacked as not supported by the evidence; but as to those points it is enough to say that in our opinion there was sufficient evidence to warrant each of the findings attacked.

It is contended, also, that the findings do not support the judgment, but this contention is not maintainable. There is only one point on this branch of the case which we deem necessary to specially notice. It is averred in the complaint that the plaintiffs offered to redeem within a certain time, and the averment is denied in the answer; and it is contended that the findings are deficient because there is no specific finding that they did so offer to redeem. We think, however, that while the finding might have been more specific, the subject is sufficiently covered by another finding. It is averred in the complaint that on February 1, 1898, appellant procured a deed from the commissioner appointed to sell the property, and that appellant "now claims under said deed, and ever since the making thereof has claimed, to be the owner in fee of said premises *free from any right of redemption* in the plaintiffs, Margaret Reese, Mary E. Dever, and Lizzie V. Reese, or either of them." This averment was not denied, and the court expressly finds it to be true. It having been thus averred, admitted, and found, it was unnecessary for the court to find, in addition, that respondents had performed the vain act of offering to do what appellant denied them the right to do.

In determining the amount which respondents should pay in order to effect the redemption, the court made certain find-

ings and rulings to which appellant excepts. The court allowed respondents to set up against taxes, etc., paid by appellant, the rental value of the premises while in possession of defendant, at twenty dollars per month, and this allowance is attacked; but we think the evidence fully warranted the court in fixing that amount.

Appellant contends that he should have been allowed for some improvements which he put on the premises; but the alleged improvements were not made until after this present action had been commenced and appellant had been informed that respondents denied his ownership of or right to the premises, and under these circumstances, if he chose to make improvements, he did it at his own peril. The principle announced in *Malone v. Roy*, 107 Cal. 518, and *Mahoney v. Bostwick*, 96 Cal. 53,¹ clearly applies here. Appellant knew that he got into possession against the consent, and in hostility to, the claims of respondents, and he was not entitled to recover from the latter the value of the improvements placed upon the land under an assertion of title hostile to them; and the finding of the court which shows that the date of the alleged improvements was subsequent to the commencement of the action was a sufficient finding on the subject.

Appellant contends that he should have been allowed the amount of an alleged street assessment against the land, which alleged assessment the court found to be void. We do not see that the court erred in so holding; the assessment was against too much land, and therefore void (*Ryan v. Altschul*, 103 Cal. 177), and it is unnecessary to consider respondents' contention as to the insufficiency of the engineer's certificate.

Appellant contends that the court erred in fixing the amount of interest which respondents must pay in order to redeem, and that more interest should have been required. The court allowed two per cent per month interest during the six-months statutory period of redemption, and thereafter the legal rate of interest of seven per cent per annum. The contention of appellant is, that two per cent per month should have been allowed until the time of actual redemption under the judgment; but this contention is not maintainable. Appellant having denied the right of redemption and prevented

¹ 31 Am. St. Rep. 175.

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the exercise of it, cannot recover the extraordinary interest which respondents would have avoided if they could have exercised their right of redemption. Indeed, respondents argue with great force that they should not have been required to pay the seven per cent per annum interest, or any interest at all, during the long period after the repudiation of their right to redeem; but respondents are not appealing, and we cannot consider any alleged error against them. However, the appellant, if the case was rightly decided against him in other respects, has no just reason to complain as to the amount of interest allowed him.

There are no other points calling for special notice. We think that the judgment is right, and that, under all the circumstances of the case, as was said by the court on the former appeal, "no injustice would be done defendant in permitting the plaintiff now to redeem."

The judgment and order appealed from are affirmed.

Lorigan, J., and Henshaw, J., concurred.

[S. F. No. 3289. Department Two.—December 29, 1903.]

J. H. BRUSH, Respondent, v. J. H. SMITH et al., Appellants.

JUDGMENT OF JUSTICE'S COURT—COLLATERAL ATTACK—INSUFFICIENT COMPLAINT—JURISDICTION—REMEDY BY APPEAL.—The judgment rendered in a justice's court, which had jurisdiction of the subject-matter of the action and of the person of the defendant, cannot be collaterally attacked as void merely because the complaint was insufficient to constitute a cause of action. The sufficiency of the complaint is not a conclusive test of the jurisdiction of the justice's court. It had jurisdiction to determine that question, and to determine it wrong as well as right, and if it committed error, and the complaint was fatally defective, the only remedy was by appeal.

Id.—VALIDITY OF EXECUTION—AMENDABILITY—REPLEVIN OF PROPERTY SEIZED—NOTICE TO SHERIFF.—In an action to recover the possession of property seized by the sheriff upon execution, where the plaintiff in such action merely notified the sheriff that the execu-

tion was issued upon a void judgment, an objection to the validity of the execution merely because it recited that the judgment was recovered "in Justice John Brown's court," of a certain township and county, instead of "the justice's court" of such township, is merely technical, and not tenable. The writ was amendable in that respect, and will be accorded the same effect as to acts done under it as if it had been amended.

APPEAL from a judgment of the Superior Court of Sonoma County and from an order denying a new trial. S. K. Dougherty, Judge.

The facts are stated in the opinion.

R. W. Miller, J. A. Barham, and E. C. Barham, for Appellants.

The judgment of the justice was good on collateral attack, whether the complaint stated a cause of action or not. (Van Fleet on Collateral Attack, sec. 71; *In re James*, 99 Cal. 376;¹ *Dryden v. Parrote*, 61 Neb. 339; *Taylor v. Coats*, 32 Neb. 30;² *North Pacific Cycle Co. v. Thomas*, 26 Or. 381;³ *Berry v. King*, 15 Or. 165; *Keybers v. McComber*, 67 Cal. 396-399; *Frankfurth v. Anderson*, 61 Wis. 107; *Head v. Daniels*, 38 Kan. 1; *Burke v. Interstate S. and L. Assn.*, 25 Mont. 315;⁴ *Winningham v. Trueblood*, 149 Mo. 592; *Bitzen v. Merck*, 23 Ky. Law Rep. 670.) The execution was sufficient to protect the officer in executing it. (*Erschine v. Hohnbach*, 14 Wall. 616; *Norcross v. Nunan*, 61 Cal. 642; *Dusy v. Helm*, 59 Cal. 108; *Holdredge v. McCombs*, 8 Kan. App. 663.)

R. F. Crawford, and Thomas Rutledge, for Respondent.

The complaint in the justice's court was fatally defective, and did not authorize any judgment, and rendered the judgment void. There was nothing to adjudicate. (*Barron v. Frink*, 30 Cal. 486-489; 1 Black on Judgments, secs. 184, 242.) The execution was issued upon void judgment, and out of the wrong court, and was not regular on its face, and therefore could not protect the officer. (Herman on Executions, sec. 65, p. 52.)

¹ 37 Am. St. Rep. 60.

² 29 Am. St. Rep. 426.

³ 46 Am. St. Rep. 636, and note.

⁴ 87 Am. St. Rep. 416.

COOPER, C.—This action was brought to recover the possession of certain cattle described in the complaint, or the value thereof in case a delivery cannot be had. The case was tried before the court and findings filed, upon which judgment was ordered and entered for plaintiff. Defendants prosecute this appeal from the judgment and an order denying their motion for a new trial. The facts are as follows: In September, 1899, defendant King commenced an action against the plaintiff in the justice court of Santa Rosa Township to recover the sum of \$299.99, besides interest. The complaint in said case, after being properly entitled, alleged: "That on or about the nineteenth day of September, 1899, at Santa Rosa, California, the above-named defendant had and received of this plaintiff, to the use and benefit of the defendant the sum of \$299.99 gold coin of the United States. That the defendant has not paid the same nor any part thereof. That said sum of \$299.99 is due and remains wholly unpaid." Judgment was prayed for for said sum with interest.

A summons was duly issued by the said justice, and personally served upon the plaintiff (who was defendant in said action).

He made default, and thereupon judgment was duly entered against him for the amount claimed in the complaint. He then moved in said justice court to set aside the default judgment, and his motion was denied. He afterwards appealed from the said judgment to the superior court of Sonoma County, and the judgment rendered in the justice court was affirmed and became final. An abstract of the justice judgment was filed in the office of the county clerk of Sonoma County, and said judgment duly docketed therein. Plaintiff did not pay the judgment so docketed against him, and, at the request of defendant King, an execution was issued in January, 1901, and delivered to defendant Smith as sheriff of Mendocino County, with directions to levy upon the cattle described in the complaint in this case. The cattle belonged to plaintiff (defendant against whom the execution issued), and defendant Smith in his official capacity levied the said execution upon said cattle and sold them to satisfy the said judgment held by defendant King against plaintiff. The taking was by virtue of the said exe-

cution, and not otherwise. The main contention of plaintiff, upon which the court below decided in his favor, is, that the judgment rendered in the justice court is void for the reason that the complaint therein does not state facts sufficient to constitute a cause of action. The complaint therein is claimed to be defective for the reason that the money is alleged to have been paid and received "to the use and benefit of the *defendant*" instead of plaintiff. If this were not clearly a clerical error, as the context of the complaint shows it to be, it would not avail the plaintiff herein. This is a collateral attack on the judgment in the justice court, and it is too well settled to need citation of authorities that a judgment cannot be collaterally attacked unless it is void. Of course, if it is void, it is in legal effect no judgment, and in such case an execution upon it would not vitalize it, and would be but waste paper. Such an execution would not protect defendant Smith if he had notice that the judgment was void, nor would it protect any one aiding and assisting him. A judgment is not void if the court has jurisdiction and power to grant the relief contained in the judgment. In this case it appears that the amount claimed in the justice court was less than three hundred dollars exclusive of interest, and the justice court therefore had jurisdiction of the subject-matter and power to enter judgment in such case. The summons was personally served upon the defendant in said action in the justice court, and the court thereafter had jurisdiction of his person. In fact, it is not seriously claimed that the justice court did not have jurisdiction of the subject-matter and of the defendant against whom the judgment was entered, but it is claimed that the complaint was wholly insufficient.

Whether the complaint states a cause of action or not was for the court of original jurisdiction to determine, and it was within the province of such court to allow the pleading to be amended. If the court below should hold a complaint sufficient, when as a matter of law it failed to state facts sufficient to constitute a cause of action, such ruling would be erroneous, but nevertheless the court had jurisdiction. It had jurisdiction to determine the question and to determine it wrong as well as right. If it committed error, the remedy was by appeal. In this case the plaintiff did not appear in

the justice court, although notified by the summons and complaint that if he did not do so, judgment would be taken against him for \$299.99 and interest. If the complaint was fatally defective, he had his remedy by appeal. He did appeal, and the judgment of the justice court was affirmed by the superior court.

The sufficiency of the complaint is not a conclusive test of the jurisdiction of the justice court. (*Crane v. Cummings*, 137 Cal. 202; *In re James*, 99 Cal. 376;¹ *Dryden v. Parrote*, 61 Neb. 339; *North Pacific Cycle Co. v. Thomas*, 26 Or. 381.²) In the latter case the correct rule is stated by Bean, C. J.: "If the object of a plaintiff can be ascertained from the allegations of his complaint, and the court has power to grant the relief demanded, and jurisdiction of the parties, the judgment is not vulnerable to a collateral attack, although the complaint may in fact be bad in substance."

The plaintiff now claims that the writ of execution was irregular and defective on its face, for the reason that it recites that judgment was recovered "in Justice John Brown's court of Santa Rosa Township, county of Sonoma," instead of reciting that it was recovered in the justice's court of Santa Rosa Township. If plaintiff could now raise such question when he failed to notify the sheriff of any such alleged defect, but notified him that the execution was issued upon a void judgment, we deem the objection too technical to merit discussion. The writ was certainly amendable in the respect pointed out, and in such case it will be accorded the same effect with reference to acts done in execution of it as if it had been amended. (*Brann v. Blum*, 138 Cal. 644; *O'Donnell v. Merguire*, 131 Cal. 527.³)

It follows that the judgment and order should be reversed.

Haynes, C., and Smith, C., concurred.

For the reason given in the foregoing opinion the judgment and order are reversed.

McFarland, J., Lorigan, J., Henshaw, J

¹ 27 Am. St. Rep. 60.

² 82 Am. St. Rep. 389.

³ 46 Am. St. Rep. 636, and note.

[Sas. No. 1022. Department Two.—December 29, 1903.]

**JOHN MURPHY, Respondent, v. J. H. MURPHY and
MARY MURPHY, Appellants.**

CROSS-COMPLAINT—FAILURE TO ANSWER—ADMISSION OF FACTS—APPROPRIATE RELIEF.—Facts alleged in a cross-complaint are admitted by a failure of the plaintiff to answer, and no proof thereof is required. Where the court found that the plaintiff was in default, and he was denied the right to introduce any proof, or offer any evidence contradicting the allegations of the cross-complaint, if it was the intention of the court to deny plaintiff the privilege of answering, it should have taken the allegations of the cross-complaint as true, and should have granted such relief upon the facts admitted as would be appropriate.

ID.—ACTION TO COMPEL RECONVEYANCE—PROOF AS TO AMOUNT PAID.—Where one object of the cross-complaint was to compel a reconveyance of the land in controversy, and it does not appear therefrom what amount of interest was paid by plaintiff to a bank on defendants' account, proof of that amount was necessary to entitle plaintiff to a reconveyance, though he would be entitled to other appropriate relief upon the admitted allegations.

ID.—INCONSISTENT ACTION OF COURT.—Where the court, after finding plaintiff in default, and refusing to permit him to controvert the cross-complaint, required the defendants to prove all of its material allegations, and permitted the plaintiff, as *amicus curiae*, to cross-examine the witnesses, and introduce on the cross-examination letters as controverting the allegations of the cross-complaint, it in effect opened up the default and nullified the previous ruling; and if it was its intention to do so, it should have allowed the plaintiff to answer, and should at least have granted the demand of the defendants for findings.

APPEAL from a judgment of the Superior Court of Colusa County and from an order denying a new trial. H. M. Albery, Judge.

The facts are stated in the opinion.

B. F. Howard, for Appellants.

Ernest Weyand, for Respondent.

SMITH, C.—This suit was brought to correct the description in a deed executed by defendants to plaintiff, of date

October 4, 1898. But it was admitted on the trial by the defendant that the deed correctly described the land which plaintiff claimed it was intended to convey, consisting of certain subdivisions of the southeast and northeast quarters of sections 3 and 10, in the township referred to in the complaint; and, accordingly, it was so found by the court and adjudged that the plaintiff take nothing by his action. There is therefore no question as to the plaintiff's case.

But in the cross-complaint of the defendants it is alleged, in effect: That some time before the date of the deed referred to in the complaint, the defendant, J. H. Murphy, had conveyed to the plaintiff the other subdivisions of the northeast quarter of section 10 and the southeast quarter of section 3, for the sum of eight hundred and ten dollars; that defendants' deed of October 4, 1898, was made upon, and in pursuance of, an agreement between the parties, by the terms of which plaintiff agreed to pay a debt of one hundred and eighty dollars, with interest, due from the defendants to the Colusa County Bank, and thereafter to sell the two tracts as a whole for a sum not less than sixteen hundred dollars, and after deducting from the proceeds eight hundred and ten dollars on account of his own land, and the amount paid to the bank, to pay the balance to the defendants; that in pursuance of the agreement the plaintiff paid the amount due to the bank, but has since repudiated the agreement, and now claims the land as his own, and that he is about to sell it to a third party for six hundred dollars, and to appropriate the proceeds to his own use. It is further alleged that the defendants before beginning the suit offered to pay plaintiff the amount due for what he had paid to the bank, and all interest thereon, and demanded a conveyance of the land in question, but plaintiff declined the offer; "and that defendants are ready and willing to pay plaintiff the amount he has paid out on account of said piece of land or any sum the court may decree to be just and equitable," etc. The prayer of the cross-complaint is, that the plaintiff be required to reconvey the land in question to defendants, upon payment by them of the sum paid to the bank by plaintiff, with interest, and for general relief.

The cross-complaint was filed and served April 25, 1901, and there was attached thereto a memorandum of default by

the clerk, of date May 13, 1901. But on the trial, this was stricken out by the court on the plaintiff's motion, on the ground, apparently, that the clerk was not authorized by the law to enter the plaintiff's default. But it was held by the court that plaintiff was in default as a matter of fact; and he was therefore denied the right of introducing any proof or offering any evidence contradicting the allegations of the cross-complaint. Defendants then moved the court for judgment in their favor on the pleadings; but the court denied the motion, and then required defendants to introduce proof on all material allegations of the cross-complaint; and thereafter the plaintiff's attorney was permitted as *amicus curiae* to cross-examine the witnesses, and in the course of the cross-examination to introduce in evidence certain letters written by defendant J. H. Murphy, purporting to give a somewhat different account of the transaction from that alleged in the cross-complaint; all of which rulings were excepted to by defendants, and are now urged as grounds of reversal. Judgment was then entered by the court, as already stated, that the plaintiff take nothing by his action; that defendants take nothing by reason of their cross-complaint; and that the parties respectively pay their own costs. The defendants appeal from the judgment, except "that part which adjudged the description of land named in the deed therein referred to to be a correct description," and from an order denying their motion for a new trial.

As to the first of the errors complained of, it is claimed by appellants, and not disputed by respondent, that the order of the court in striking out the memorandum of default was erroneous; but assuming (for the purposes of the decision) that this was the case, yet plaintiff's motion was in effect denied, and he was precluded by order of the court from introducing evidence upon the allegations of the cross-complaint. The appellants, therefore, had the case stopped here, would have had no cause to complain. But in requiring the defendants "to introduce proof on all material allegations of the cross-complaint," the effect of this ruling was to that extent nullified. For the facts alleged in the cross-complaint, having been admitted by the failure of the plaintiff

to answer, no proof in their support was required, (*Herrold v. South*, 34 Cal. 124; *Jones v. Jones*, 38 Cal. 585; *Stockton etc. v. Glenn's Fall Ins. Co.*, 121 Cal. 171; *Merquire v. O'Donnell*, 103 Cal. 50; Code Civ. Proc., secs. 442, 462); and in permitting the plaintiff's counsel as *amicus curiae*, in the course of cross-examination, to introduce in evidence the letters of the defendant J. H. Murphy, as controverting the allegations of the cross-complaint, the court in effect opened the default. We are therefore at a loss to determine what was the intention of the court, or the effect of its various rulings; that is to say, whether it was or was not the intention of the court to open the default or to permit the plaintiff to controvert the allegations of the cross-complaint. If it was its intention to permit the allegations of the cross-complaint to be controverted, it should have allowed the plaintiff to answer, or at least it should have complied with defendants' demand for findings. On the other hand, if it was its intention to deny the plaintiff the privilege of answering, it should have taken the allegations of the cross-complaint as true, and granted such relief as upon the facts admitted would have been appropriate. It could not, indeed, have entered judgment as prayed for in the cross-complaint; because it does not appear therefrom what amount was paid by the plaintiff to the bank on account of interest, and without proof of this amount a reconveyance would have been improper. But the defendants, if not entitled to the precise relief demanded, were entitled, on the admitted facts, to some relief, as, for example, an adjudication determining the character of the transaction.

It will be proper, however, for the court in further proceeding in the case, if it be so advised, to allow plaintiff to answer the cross-complaint, and also to allow the defendants to amend the same in case they desire to do so.

We advise that the judgment and order appealed from be reversed and the cause remanded for further proceeding in accordance with the views herein announced.

Cooper, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and the cause

remanded for further proceeding in accordance with the views herein announced.

McFarland, J., Lorigan, J., Henshaw, J.

A petition for a hearing in Bank was denied on January 28, 1904. In the order denying the hearing in Bank the court said: "No opinion is expressed upon the question of whether or not the cross-complaint states a cause of action."

[S. F. No. 3606. Department Two.—December 29, 1903.]

SARAH MADISON, Appellant, v. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY. Respondent.

LIFE INSURANCE—CONSTRUCTION OF POLICY—FORFEITURE.—Where a policy of life insurance clearly called for the prompt payment of the cash portion of the annual premium notes as a condition upon which the company will hold itself liable to pay the whole amount of the policy, with deduction of the balance of the year's premium, and of all notes given for premiums, and its agreement to pay as many tenth parts of the original sum assured as there shall have been complete annual premiums paid, is on the express condition that "all premium notes must be taken up, or the interest thereon be paid annually in cash, on the date of the maturity of the premium, until the notes are canceled by returns of the surplus, or the whole policy will be forfeited," an additional provision, that "if the said premiums or the interest upon any note given for premiums shall not be paid on or before the days above mentioned for the payment thereof, then, and in every such case, the company shall not be liable for the payment of the whole sum assured, but only for such part thereof as is expressly stipulated above, and the remainder shall cease and determine," is not inconsistent with the previous provision for forfeiture, and the failure to pay the interest stipulated avoids the policy.

ID.—DEFAULT AFTER TEN YEARS—PAYMENT OF FOUR YEARS' PREMIUMS BY DIVIDENDS—MEASURE OF RIGHTS AND OBLIGATIONS.—Where the only default of the defendant took place after he had had the benefit of ten years' insurance, and occurred at a time when there were outstanding notes unpaid for principal and interest, which were the consideration for the insurance, and of which he paid no part, he could not, on the ground that the premium notes for the first four years had been paid by dividends, claim four tenths of the policy, as if he had defaulted at the end of four years and

then paid up the premium notes, whereas he had not in fact then defaulted. His rights and his obligations under the policy must be measured as of the time when the actual default took place, and non-payment of the premium notes then due, or of the interest thereon, forfeited the policy.

ID.—STIPULATION FOR FORFEITURE—PRESUMPTION—VOLUNTARY DEFAULT OF HOLDER.—A stipulation for a forfeiture in a contract will be enforced, if the rights of the parties cannot be otherwise preserved. The holder of a policy of life insurance will be presumed to understand its various provisions for forfeiture by which he may suffer loss through his own fault, and cannot complain of hardship from a forfeiture when he suffers voluntary default.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank H. Kerrigan, Judge.

The facts are stated in the opinion.

W. A. Dow, and Van Ness & Redman, for Appellant.

Forfeitures are not favored in law. (*Palatine Ins. Co. v. Ewing*, 92 Fed. Rep. 111; *McNamara v. Dakota etc. Ins. Co.*, 1 S. D. 342; *Northwestern Mut. Life Ins. Co. v. Hazlett*, 105 Ind. 212.¹) When the meaning of the policy is doubtful, it should be given such construction as the insured might reasonably have put upon it. (*Metropolitan Life Ins. Co. v. Drash*, 101 Pa. St. 278; *Northey v. Bankers' Life Assn.*, 110 Cal. 547; *Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 209; *Laidlaw v. Mayre*, 133 Cal. 170, 179; *United States Life Ins. Co. v. Ross*, 57 Ill. App. 98; *Commercial Travelers' etc. Assn. v. Fulton*, 79 Fed. Rep. 428; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 297; *United States Mut. Assn. v. Newman*, 84 Va. 52.)

George A. Rankin, for Respondent.

The provision for forfeiture is clear, and there is nothing in the policy inconsistent therewith. (*Ewald v. Northwestern Mut. Life Ins. Co.*, 60 Wis. 431; Bliss on Life Insurance, secs. 182-185.)

CHIPMAN, C.—This is an action upon a policy of life insurance, and was submitted upon an agreed statement of

¹ 55 Am. Rep. 192.

facts. Defendant had judgment, and plaintiff appeals. The policy was issued upon the life of P. T. Madison, payable to his wife, plaintiff herein. The face of the policy is two thousand dollars, and was on what is termed "the ten-payment life plan with premiums payable annually, \$87.42, and provided for payment of the premiums partly in cash and partly by note. The cash portion was \$53.24, and the note portion was \$34.18." The principal of the notes was not required to be paid before the death of the insured, but the interest thereon was to be paid annually. The dividends on the policy were to be applied to the payment of the notes. On July 16, 1867, the date of the policy, Madison paid the company cash \$53.24 and executed to the company his note for \$34.18, in full payment of the first annual premium. On July 16th of each succeeding year to and including the year 1872, he "duly and seasonably paid to the defendant herein, and defendant received and accepted the premiums required by the terms of the policy to be paid, viz., the said sum of \$53.24 in cash, and his note for the sum of \$34.18." On July 16, 1873, and each year to and including 1876, he paid no cash premiums, but, in addition to a premium note for \$34.18 executed by him in each of said years, he executed to defendant, in lieu of the cash part of the premiums, notes as follows: 1873, for \$53.24; 1874, for \$71.06; 1875, for \$78.88; and 1876, for \$53.24,—which were received by defendant in addition to said premium notes for \$34.18 each, executed during each said years in settlement of the premiums for said years, "subject to the terms of said policy." The note given in 1874 for \$71.06 "included not only \$53.24, the cash part of the annual premium, but also one year's accrued interest, then unpaid, on all these outstanding premium notes, given by the insured on account of said policy." So, also, the note given in 1875 for \$78.88 included like items. The dividends payable out of the surplus referred to in the policy in the sum of \$144.61 were credited to said policy prior to 1877, and were sufficient to take up and cancel four of said premium notes of \$34.18, for the years 1867, 1868, 1869, and 1870, with a balance of \$7.89 to be applied, and which was applied, on the fifth note bearing date July 16, 1871. No other or further dividends were earned upon said policy, and said four notes referred to were returned to

Madison canceled, and said credit of \$7.89 given on said note of July 16, 1871. The interest on said first four notes last above enumerated was fully paid prior to their cancellation, and the interest on all the other notes given by Madison was duly paid by him in cash to July 16, 1876, except the interest which, as aforesaid, formed part of said notes of 1874 and 1875, for \$71.06 and \$78.88 respectively. "From July, 1876, no interest on either or any of the outstanding premium notes was or has been paid either in cash or otherwise"; and, "no premiums, either in the form of cash or note, or part cash and part note, have been paid since July 16, 1876, upon or on account of said policy, and none or either of the premium notes . . . have or has been in any form taken up, paid, or canceled and . . . are now held unpaid and uncanceled by defendant." The total premium notes given amounted to \$598.22. Dividends earned and applied reduced this amount to \$453.61 on July 16, 1876, the present amount of unpaid principal of outstanding notes. The accrued interest paid at the beginning of each year on the total amount of premium notes at the end of the preceding year is as follows: 1868, in cash, \$2.39; 1869, cash, \$4.79; 1870, cash, \$7.18; 1871, cash, \$9.57; 1872, cash, \$10.09; 1873, cash, \$11.44. In 1874 the interest, \$17.82, was included in the note for \$71.06, and in 1875 the interest, \$25.64, was included in the note for \$78.88. In 1876 accrued interest, \$34, was paid in cash. On these facts plaintiff claims four tenths, or eight hundred dollars, of the policy. Each of the premium notes contained the following: "With interest at the rate of seven per cent per annum, which interest shall be paid annually, or the policy be forfeited." A similar provision is also in the notes given in lieu of the cash premiums. All the notes are signed by P. T. Madison alone, except the premium note of July 16, 1872, which is signed also by plaintiff, Sarah Madison. Madison died November 9, 1900, having made no further payments.

The questions raised by the appeal involve the true construction and meaning of the policy and call for a statement of certain of its provisions, to wit: The company by the policy, "in consideration . . . of the annual premium in advance, consisting of an annual premium note of thirty-four dollars and eighteen cents (the interest on which must

be paid annually in cash at the date of the maturity of the annual premium) and of the annual cash premium of fifty-three dollars and twenty-four cents to be paid at or before noon on or before the sixteenth day of July in every year during the first ten years of the continuance of this policy, doth assure the life of . . . for the term of his natural life." The company agrees to pay the said sum assured, "the balance of the year's premium, and all notes given for premiums, if any, being first deducted," etc. "At each distribution of the surplus, after three years from the date hereof, a due proportion of such surplus on each year's business, during the continuance of this policy, will be returned to the said assured. And the said company further promises and agrees, that, if default shall be made in the payment of any premium, it will pay as above agreed, as many tenth parts of the original sum assured as there shall have been complete annual premiums paid at the time of such default. But in order to secure such proportion of the policy all premium notes must be taken up, or the interest thereon be paid annually in cash, on the date of the maturity of the premium, until the notes are canceled by returns of the surplus or the whole policy will be forfeited. This policy is issued and accepted by the parties in interest on the following express conditions: . . . 3d. If the said premiums or the interest upon any note given for premiums shall not be paid on or before the days above mentioned for the payment thereof, . . . then, and in every such case, the company shall not be liable for the payment of the whole sum assured, but only for such part thereof as is expressly stipulated above, and the remainder shall cease and determine. 4th. In every case where this policy shall cease or become null and void, all payments thereon shall be forfeited to the company."

It is quite clear that the contract calls for the prompt payment of the cash portion of the annual premium notes as a condition upon which the company will hold itself liable to pay the whole amount of the policy, after first deducting the balance of the year's premium and all notes given for premiums, if any. Its agreement next to pay as many tenth parts of the original sum assured as there shall have been complete annual premiums paid, should there be any default in the payment of any premium, is on the express con-

dition that "all premium notes must be taken up, or the interest thereon be paid annually in cash on the date of the maturity of the premium, until the notes are canceled by return of surplus, or the whole policy will be forfeited." A clear and unmistakable forfeiture appears from the statement of facts, and we do not understand that if this was all of the contract appellant would dispute the inevitable result.

But it is contended that the provisions of the policy embraced in the third subdivision above quoted are inconsistent with and contradictory of the provisions just referred to, and therefore that which leads to a forfeiture must be rejected.

A precisely similar policy of defendant company, where the facts were also similar, was before the supreme court of Wisconsin in *Ewald v. Northwestern Mut. Life Ins. Co.*, 60 Wis. 431. The questions now here were fully considered and many cases bearing thereon in other courts cited and commented upon. The conclusion was reached as stated in the *syllabi*; "A forfeiture stipulated in a contract will be enforced if the rights of the parties cannot otherwise be preserved. The holder of a policy of life insurance will be presumed to understand its various provisions for forfeiture by which he may suffer loss through his own fault, and cannot complain of hardship from a forfeiture when he suffers voluntary default. In an action commenced after the expiration of the term of the policy to recover four tenths of the original sum assured, *held* that by reason of the plaintiff's failure to pay annually in cash the interest upon the four premium notes given by him, the whole policy became forfeited."

In the case of *Russum v. St. Louis Mut. Life Ins. Co.*, 1 Mo. App. 228, the policy was subject to two provisos: First, that if default was made in the payment of any annual premium thereafter becoming payable, such default should not work a forfeiture of the policy, but the sum assured should be proportionately reduced; thus, if only the first annual premium should be paid, then, in case of death, only one tenth of the sum assured should be claimable. If two premiums only were paid, then two tenths, and so on. The

second proviso was a qualification of the first. It provided that "if the insured shall fail to pay annually in advance the interest on any unpaid notes or loans which may be owing on account of the above-mentioned annual premiums, . . . then and in every such case the said company shall not be liable for the payment of the sum insured, or any part thereof, and this policy shall cease and determine." It was there urged, as here, that the two provisions are inconsistent, and the one leading to forfeiture must be disregarded. It was held, after a careful examination of the provisions, that they are not inconsistent or contradictory; that they may stand together, and that it is the duty of the court to give effect to both of them; that the failure to pay the interest avoided the policy.

In *Moses v. Brooklyn Life Ins. Co.*, 50 Ga. 196, the policy was on the ten-year plan, with participation in the profits. The premium was payable part in cash and part by note, and one of the conditions of the policy was, that should the assured fail to pay the premiums, or any note or notes which may be given in part payment of any premium, the policy was to be void. It also stipulated that after two annual payments, should the party wish to discontinue, the company will issue a paid-up policy for as many tenths of the amount originally assured (which was fifteen thousand dollars) as there have been annual premiums paid in cash. The prayer of the bill was to have it decreed that the defendant issue a paid-up policy for three thousand dollars and deliver the notes given to the company canceled and receive the present policy canceled. The assured had made two payments, two premiums, part in cash and part by note. The court said: "The payment by complainant to the company of the two first annual premiums was a condition precedent to be performed on her part by the terms of the contract before she was entitled to have issued to her by the company a paid-up policy of three thousand dollars. To enable the company to pay dividends from the profits, it is indispensably necessary that the assured should pay to the company the annual premiums stipulated to be paid, so as to create a fund from which profits may be derived." It was held that the assured was not entitled to a paid-up policy until the note given for the premium had first been paid.

In the Wisconsin case (*Ewald v. Northwestern Mut. Life Ins. Co.*, 60 Wis. 431) the policy was one of endowment issued in 1867, and the assured paid the cash premiums for that and the three succeeding years, and also paid the interest on the premium notes given for those years, but nothing thereafter. The action was brought after the expiration of the policy. After quoting the third subdivision of the policy, stated above, the court proceeds at pages 438 et seq. to give its reasons at considerable length for the construction of the policy. We are satisfied with the result there reached, notwithstanding the very searching analysis of the opinion by appellant's counsel.

We do not think the assured could, by the terms of the policy, have been misled into the belief that he could have full insurance for ten years and then cease further payments, leaving his notes unpaid, and yet have the right to a paid-up policy of four tenths, because the first four notes had been taken up by dividends in the mean time. If at the end of the fourth year he had paid the cash premiums and the premium notes and interest, and had then ceased or made default, he would have earned four tenths of the policy. But nothing in the policy warranted his continuing to pay his cash premiums, and to give his premium notes for six or seven years, thus obtaining full insurance for that time, and then default, and yet have the right to claim four tenths of the policy. In fact, his default, and his only default, was after he had obtained this full insurance for this period, and his default was at a time when there were outstanding notes still unpaid, principal and interest, which were themselves the consideration for the insurance. When he made default he could, by paying all the outstanding notes, have had "as many tenth parts of the original sum assured as there shall have been complete annual premiums paid *at the time of such default*," for thus reads the policy. But he could not, after having received the benefit of ten years' full insurance, make default, refuse to pay his outstanding obligations given for this insurance, and claim four tenths of the policy, as though he had defaulted at the end of four years. His election to continue and reap the benefits of full insurance carried with it the reciprocal duty to discharge his obligations incurred to that end; and the rights of the assured and his obligations

must be measured as of the date when he defaulted, and not of some prior date, by assuming what in fact did not occur, that he defaulted at this prior date. Appellant's contention would result in his having a paid-up policy for eight hundred dollars (four tenths of two thousand dollars); also a full insurance of two thousand dollars for ten years; also a return of all his notes canceled which he gave to secure this insurance. Such a construction would destroy any company doing business under such a system, and finds no warrant in the terms of the policy. In point of fact, there was no default for the ten-year period, for the assured had paid in cash or notes. To keep the policy alive thereafter, obviously his duty was to pay the annual interest charge on his notes or take up the notes. He still had a considerable life expectancy, and rather than continue payment of interest charges he elected to quit, and we cannot find any warrant for ignoring these outstanding obligations and adjusting the loss as though they did not exist.

It is advised that the judgment be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

McFarland, J., Henshaw, J., Lorigan, J.

A hearing in Bank was denied on January 28, 1904.

Beatty, C. J., delivered the following dissenting opinion:—

BEATTY, C. J.—I dissent from the order denying a rehearing. The language of this policy was chosen by the defendant, and seems to have been chosen not for the purpose of expressing a clear intention, but rather with a view of giving it the appearance of intending one thing while really providing for something inconsistent. In one clause (clause 3) it provides that in a certain contingency there shall be a partial forfeiture of the policy, and this provision is set out with considerable fullness and rotundity of expression. In another clause, by a half-dozen words at the end of a sentence, an absolute forfeiture is provided upon the same contingency. I do not think that the defendant is entitled to

claim for itself the most favorable construction of a contract which it has purposely made ambiguous, and especially where the result is manifestly unjust.

In this particular case, perhaps, no serious injustice is done, for the notes given by the insured in payment of the premiums, which by the terms of the policy were payable only in cash, and were forfeitable in case of default, would, with interest, amount to as much as the unforfeited portion of the policy, and they, in my opinion, constitute a counter-claim in favor of the defendant.

But the principle of the opinion, applied to other claims upon similar policies, might work the grossest injustice. As, for instance, in the case put by counsel: "The insured may have paid *ten premiums* in cash and notes; he may have paid interest on these notes for many years, until all of them, except the last, have been canceled by dividends; he may then default in the payment of the annual interest on the last uncanceled note, *reduced by dividends to a nominal amount*. On the construction which the court gives the policy, the insured loses everything, although, if he had not paid *any part of the tenth premium*, he would have been entitled to nine tenths of the policy in paid-up insurance! Because he received term insurance for the *tenth year* for the face of his policy (which he could have purchased for *less than half the cash part of the tenth premium*, he is put in a worse position than if he had failed to pay any part of the tenth premium! Because he received something *which he more than paid for*, he must lose that which he fully paid for!"

A construction of this policy which would inevitably lead to such a result in the case supposed, and in other like cases, certainly has little to recommend it, and, in my opinion, may be avoided upon two grounds: 1. That the doubtful or conflicting clauses of an agreement should be construed against the party responsible for the ambiguity; and 2. Because a provision involving a total forfeiture should yield to a provision involving only a partial forfeiture.

[S. F. No. 3600. Department Two.—December 30, 1903.]

In the Matter of the Estate of ANGELIA R. SCOTT, Deceased. EUGENE WORMELL, Appellant, v. MORTIMER S. CHAMBERLAIN and RACHAEL JOHONNOTT, Respondents.

ESTATES OF DECEASED PERSONS—PETITION FOR PARTIAL DISTRIBUTION—CONSTRUCTION OF WILL AND CODICIL—REVOCATION OF BEQUEST.—

Where by the express terms of the codicil to a will of a deceased testator a desire was expressed to revoke and change some of the former devises and legacies, and that the codicil shall control the provisions of the former will, and the codicil, after specific gifts, disposes of the whole residue of the estate to certain persons named, of whom a petitioner for partial distribution of the estate is not one, though such petitioner was named as one of the persons entitled to a portion of the residue in the original will, the bequest thereof in the original will is expressly revoked by the codicil, and the petitioner has no interest in the estate.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a petition for partial distribution of the estate of a deceased testator. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

L. Seidenberg, and R. P. Clement, for Appellant.

There was no expressed intention to disinherit the appellant. The remainder of the will, so far as not inconsistent with the codicil, was expressly allowed to stand. (Civ. Code, secs. 1296, 1322; *Estate of Upham*, 127 Cal. 97; *In re Ladd*, 94 Cal. 674, 675; *Whitman v. Parker*, 52 N. Y. 462; *Kerr v. Dougherty*, 79 N. Y. 327, 348; *Viele v. Keeler*, 129 N. Y. 199; *Derby v. Derby*, 4 R. I. 428; *Doe v. Hicks*, 8 Bing. 480, 489; *Colt v. Colt*, 32 Conn. 462; 6 Am. & Eng. Ency. of Law, 2d ed., 186.)

Houghton & Houghton, for Respondents.

A gift of the residue of the estate in a codicil revokes a gift of the residue in the will. (*Earl of Hardwicke v. Douglas*,

7 Clark & F. 795; *Evans v. Evans*, 17 Sim. 106; *Sturgis v. Work*, 122 Ind. 134;¹ *Boseley v. Boseley*, 14 How. 390, 395; *Goods of Hastings*, 20 W. R. 616; 26 L. T., N. S., 715; *Matter of Richard Estate*, 36 W. N. Cas. (Pa.) 264.)

Philip G. Galpin, for other Devisees.

The residuary devises in the codicil are absolutely irreconcilable with any residuary devise in the will, and the Civil Code controls. (Civ. Code, sec. 1321.)

McFARLAND, J.—The deceased, Angelia R. Scott, died testate, and her estate being in course of administration, Eugene Wormell, the appellant, filed a petition for the partial distribution to him of his alleged proportion of certain moneys in the hands of the executors, claiming that he was a residuary legatee and devisee under the will of the deceased. The court held that he was not such legatee or devisee and had no interest whatever in the estate, and denied the petition; and from the order denying the petition said Wormell appeals.

Respondents contend that there is no authenticated record before us which presents the question sought to be raised by appellant; but as we think that the order appealed from should be affirmed on the merits, we will not consider the alleged insufficiency of the record.

The documents which constitute the last will and testament of the testatrix are an original will and two codicils. The first codicil merely makes a change of the executors named in the will, and is of no consequence here, except perhaps as explaining a certain unimportant reference in the second codicil to a former codicil. The questions involved in this appeal arise entirely out of the will and the second codicil.

The will was executed November 7, 1891. It contains a number of specific legacies, and then proceeds as follows: "I give, devise, and bequeath all the rest and residue of my property as follows: One fiftieth thereof to each of the following persons, children of my late brother, Amos P. Wormell, namely,"—and then a number of such children of said Amos are named, among whom is the appellant herein, Eugene Wormell. A large number of other persons were then named

¹ 17 Am. St. Rep. 349.

to whom one or more fiftieths are given, until the entire fifty fiftieths of the residue is disposed of.

The second codicil, above referred to, was made October 22, 1897,—about six years after the will. In the codicil the testatrix refers to the former will, and states that the death of two or three devisees named therein makes a new distribution necessary, and, also, that she desires to revoke and change some of the former devises and legacies, and to make some new ones, and that she prefers to do this “by way of another codicil to my former will instead of executing a new one.” Then follows this clause: “but in any respect in which this codicil shall conflict with the provisions of my former will, I fully intend that this codicil shall control the provisions of the former will, and that otherwise the former will and the codicil thereof shall stand unaffected by it.” The testatrix then proceeds, in the codicil, to make a number of specific gifts, and after these specific gifts she used this language: “I give, devise, and bequeath all the rest and residue of my estate subject to all unrevoked legacies and bequests of my will and subject to those herein contained, as follows: Of such residue two fiftieths thereof to my nephew, Andrew Wormell,”—and then follow gifts of the whole residue by fiftieths to various named persons, among whom appellant here is not one.

The case has been argued very fully by counsel for each side and a number of authorities cited; but it is so obvious that appellant takes nothing under the two documents which constitute the last will and testament of the deceased that a review of the authorities or an extended opinion seems uncalled for. By the codicil all the residue of the property of the testatrix, after the specific legacies, is given to persons other than appellant; this provision is utterly inconsistent with the provision of the original will, by which part of that residue was given to appellant; and the provision of the codicil prevails, not only according to general principles of construction applicable to the subject, but by the express provision of the codicil above quoted.

The order appealed from is affirmed.

Lorigan, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[Crim. No. 1046. Department Two.—December 30, 1903.]

THE PEOPLE, Respondent, v. FRANCIS STEVENS, Appellant.

CRIMINAL LAW—ROBBERY—DESCRIPTION OF PROPERTY IN INFORMATION—IMMATERIAL AVERMENT OF VALUE.—In an information for robbery, committed in the felonious taking of personal property from the person or immediate presence of the prosecuting witness, accomplished by means of force or fear, an averment of value of the property taken is immaterial, and may be disregarded. Where the property taken is described as "one purse containing twenty-eight dollars and sixty-two cents, in lawful money of the United States of America, of the value of twenty-eight dollars and sixty-two cents," the information charges the taking both of the money and of the purse, and is sufficiently certain as against a motion in arrest of judgment.

ID.—PROOF OF ROBBERY—LARCENY.—Where the evidence showed that the prosecuting witness slept with defendant, after hanging his pantaloons containing the money in question on the headboard of the bed, and awoke to find the defendant standing over him, with the pantaloons in one hand and a razor in the other; that the prosecuting witness then seized the pantaloons from the defendant and jumped toward the door, to which defendant ran and stood against and threatened him with the razor, unless he delivered up his "stuff"; that the prosecuting witness then, through fear, threw the pantaloons on the bed, and while defendant was engaged in rifling them unlocked the door and escaped,—the facts show a case of robbery, though the original taking of the pantaloons may have been a larceny.

ID.—PROOF OF INTRINSIC VALUE—GOLD MONEY—JUDICIAL NOTICE.—Where it appeared that a twenty-dollar gold piece was part of the money taken, the court will take judicial notice that it had intrinsic value, without further evidence. It was not necessary to show that the purse was of intrinsic value.

ID.—IMMATERIAL INSTRUCTIONS AS TO LARCENY.—Where the evidence was such that if the defendant was not convicted of robbery, he could not be convicted at all; and where the information was directed solely at the final act of forcible robbery, and not against the act of taking down the pantaloons from the headboard, instructions on the subject of larceny were immaterial; and the defendant having been convicted of robbery, it is immaterial whether larceny was correctly defined in any instruction given.

ID.—IMPROPER REQUESTS—NATURE OF ROBBERY.—Requested instructions as to robbery, each of which ignored the forcible taking of property from the "immediate presence" of the owner by force or fear, were properly refused.

ID.—REQUEST AGAINST EVIDENCE.—A requested instruction based upon the assumption, without evidence, and against the evidence to the contrary, that the money was taken from the pantaloons while the owner slept, was properly refused.

ID.—INSTRUCTION—DISTRUST OF FALSE WITNESS.—An instruction to the jury that “if any witness examined before you has willfully sworn falsely to any material matter, it is your duty to distrust the entire evidence of such witness,” was proper, and in substantial accord with the statute.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion.

Milton A. Nathan, and Richard P. Henshall, for Appellant.

U. S. Webb, Attorney-General, C. N. Post, Assistant Attorney-General, and Lewis F. Byington, District Attorney, for Respondent.

GRAY, C.—The defendant was convicted of robbery, and appeals from the judgment and from an order denying him a new trial.

1. He complains, first, that the information is insufficient as against the motion in arrest of judgment. The alleged defect consists in the description of the property of which the prosecuting witness is said to have been robbed. The description is as follows: “One purse containing twenty-eight dollars and sixty-two cents in lawful money of the United States of America of the value of twenty-eight dollars and sixty-two cents in lawful money of the United States, the personal property of him, the said Morres Aronstein, then and there in the possession of said Morres Aronstein,” etc. The point urged is that the information is uncertain in that it cannot be told whether the “value refers to the purse or to the money contained in the purse, or which the defendant is charged with having stolen.”

The allegation as to value was unnecessary and immaterial, and may be disregarded. The felonious taking of personal property in the possession of another from his person or

immediate presence and against his will, accomplished by means of force or fear, is robbery, irrespective of the value of the property so taken. (Pen. Code, sec. 211; *People v. Chuey Ying Git*, 100 Cal. 437; *People v. Richards*, 136 Cal. 127.)

The defendant could not have taken the purse containing the money without taking the money that was in the purse, and it is therefore clear that the information charges the taking of the money as well as the purse. The information is therefore sufficient as against the motion in arrest of judgment.

2. It is next contended that the evidence disclosed a case of larceny, and not robbery. The prosecuting witness testified that he went to bed with defendant, hanging his pantaloons containing some thirty-five dollars in money on the head-board of the bed; that soon thereafter he awoke to find the defendant standing upon the bed over him, with these same pantaloons in one hand and a razor in the other. The prosecuting witness then asked defendant: "What are you doing?" Defendant replied: "I am after your stuff." The prosecuting witness then grabbed the pantaloons from the defendant and jumped toward the door. He is very confident that the money was still in the pantaloons at this time and had not been removed from them. The defendant beat him to the door and stood against it, and threatened and menaced the prosecuting witness with a razor, striking him under the chin with the hand that held the razor. Defendant said: "Now, that is what I got you up here for. I got you up here for your stuff. I want your stuff and you give it up." The prosecuting witness was very much frightened at this, and threw his pantaloons on the bed to attract the defendant away from the door. As the defendant went for the pantaloons, the prosecuting witness unlocked the door and escaped. The defendant then rifled the pantaloons of the greater portion of the money. These facts disclose a case of robbery. It may very well be that taking the pantaloons down from the head-board while the owner slept constituted a larceny, but the owner recaptured the pantaloons with the money and purse in them, and was thereafter induced, "against his will, accomplished by means of force and fear," to yield up to the defendant the possession of the pantaloons with the "stuff"

in them that the defendant was after. This latter act was beyond question a robbery. (Pen. Code, sec. 211.)

If it be admitted, as is contended by appellant, that the law requires a showing that the property taken was of *some pecuniary value*, this requirement was fully complied with when the police officer testified: "The money that Stevens handed me was a twenty-dollar gold piece, a one-dollar piece, two dimes, one nickel, and a one-cent piece." It is not necessary that any witness should testify that a twenty-dollar gold piece is of some intrinsic value. The court will know that without any further evidence. It was not necessary to show that the purse was of any intrinsic value, even under the rule contended for. This rule was fully satisfied when any of the articles taken was shown to have intrinsic value.

The information met every possible requirement as to "some intrinsic value" when it described the twenty-eight dollars and sixty-two cents as "lawful money of the United States of America."

3. The instruction of the court as to grand and petit larceny complained of by defendant need not be considered in detail. The evidence was of such a nature that if the defendant was not convicted of robbery he should have been acquitted altogether. There was no lesser offense of which the jury could logically find defendant guilty if they were not satisfied beyond a reasonable doubt that he was guilty of robbery. The defense relied on by defendant at the trial was, that he was guilty of no crime whatever, and his testimony would have made this good if the jury had believed it. The position of the prosecution was, that he was guilty of the very crime charged against him,—to wit, robbery,—and that he had taken the property by means of force and fear, and could be guilty of nothing less than robbery, if guilty at all. The information was not directed against the act of taking the pantaloons down from the headboard, but against the final act of forcible robbery to which the prosecuting witness testified. Instructions as to larceny were, then, immaterial, and the giving or refusing of them could not injure defendant. (*People v. Swist*, 136 Cal. 521.) Nor does it matter whether larceny, grand or petit, was correctly defined in any instruction given,

—and this for the reason that defendant was not convicted of larceny. (*People v. O'Neal*, 67 Cal. 378.)

4. Requested instructions 1, 4, and 10 were properly refused for the reason assigned by the trial judge. Each of them ignored the forcible taking of property from the "immediate presence" of the owner as a possible element of the crime of robbery. In each of them the jury were in effect told that the taking must be from the person to make out the crime of robbery. The law permits a conviction of robbery where the felonious taking is by force or fear from the "immediate presence" of the one in whose possession the property is. (Pen. Code, sec. 211.)

Requested instruction 5 was based upon the erroneous assumption that there was evidence tending to show that the money was taken from the pantaloons while the owner slept.

There was no such evidence, but the evidence was exactly the contrary. The instruction was therefore properly refused.

5. "The court charges you that if any witness examined before you has willfully sworn falsely as to any material matter, it is your duty to distrust the entire evidence of such witness." The above instruction was proper and in substantial accord with the statute (Code Civ. Proc., sec. 2061, subd. 3), as construed in *People v. Fitzgerald*, 138 Cal. 45. (See, also, *People v. Sprague*, 53 Cal. 491; *People v. Arlington*, 131 Cal. 231.)

We advise that the judgment and order be affirmed.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

Hearing in Bank denied.

[Crim. No. 1011. Department Two.—December 31, 1903.]

THE PEOPLE, Respondent, v. ERNEST DOWELL, Appellant.

CRIMINAL LAW—BURGLARY—TESTIMONY OF CO-DEFENDANT—CROSS-EXAMINATION—ENTRY IN MEMORANDUM-BOOK.—Upon a prosecution for burglary, where a defendant, jointly indicted with the appealing defendant, testified that he alone had committed the burglary, and that he had not seen the appellant after the next morning until he met him in Peoria, Illinois, where both of them were arrested, it was proper on cross-examination to show to the witness a memorandum-book kept by him as a diary, and to ask him if a memorandum therein appearing, to the effect that he and appellant left together the next day, was not in his handwriting, and after he had repeatedly denied that it was, it was not prejudicial error to allow the prosecution to ask him directly and pointedly whether the entry was not made by him.

ID.—ERRONEOUS INSTRUCTION—INTOXICATION AS AFFECTING DEGREE—HARMLESS ERROR.—Upon a prosecution for burglary, the degree of the crime is fixed solely by the time of the commission, whether at night or in the daytime; and it was erroneous to instruct the jury that "evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of the crime." But where the sole defense was, that the defendant did not commit or aid in the burglary, and the defendant did not claim that he was intoxicated to such a degree as to render him incapable of forming a criminal intention, but assumed to give a full account of all that transpired with minute detail, and requested an instruction on the question of the effect of intoxication, he was not prejudiced by the error.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

W. H. & C. L. Shinn, for Appellant.

U. S. Webb, Attorney-General, and E. B. Power, Deputy Attorney-General, for Respondent.

LORIGAN, J.—The appellant was convicted of burglary in the first degree, and from the judgment and an order denying his motion for a new trial appeals.

The burglary charged was the felonious entry of a room in the Doty Block, in the city of Pasadena, occupied by several young men employed at the Hotel Green in that city. The result of the entry was the abstraction from said room of a large amount of wearing-apparel belonging to its occupants.

Several alleged errors are relied upon for reversal.

One F. A. Smith had been jointly informed against with the appellant for the offense, and had pleaded guilty. Both he and appellant were arrested in Peoria, Illinois, where they had gone immediately following the alleged burglary. Smith was called as a witness on behalf of appellant and testified, among other things, that he alone had committed the burglary, that although he and appellant had been together all the afternoon, and the latter had gone with him to the block where the burglary was committed, and remained with him during the night after the burglary was accomplished, yet appellant had nothing to do with it; that they separated the next morning, and he did not see the appellant again until he met him in Peoria.

On cross-examination the witness was shown a small memorandum book kept by him as a diary, and was asked by the district attorney if an entry appearing therein was in his handwriting, to which he responded in the negative. He was again asked the same question, to which he answered that he did not think it was. He was then asked the direct question whether such entry appearing therein, "Left Los Angeles with Jiggers February 4th" (Jiggers was a nickname for the appellant), was not made by him. To this last question he replied that he did not remember ever making it, and did not think any of it was in his handwriting.

Appellant complains that the inquiry, in the manner it was made, and after the denial of the witness that the entry was in his handwriting, was prejudicial to him. We do not think so. It was proper in cross-examination for the people to contradict the witness's statement on direct examination, that he did not see appellant after the night of the burglary until he met him at Peoria, by calling his attention to an entry found in a diary in all other respects confessedly kept by the witness, tending to show that they had left Los Angeles together. It is true that the witness denied that the entry was

in his handwriting, but as it was found among other entries in the diary made by him, this was sufficient warrant for asking the question directly and pointedly as it was asked. Even if it were error to ask it, it was not such prejudicial error as would warrant a reversal. Whether the appellant and Smith left Los Angeles together next day was not an essential fact in the case necessary to be proven to warrant a conviction. That both of them were together during the day and night of the burglary, and left Los Angeles the next day or the day following, and were together in Peoria within about two weeks afterwards, is admitted. How they left Los Angeles, whether separately or in company, was not a matter of grave importance.

The principal ground of complaint, however, is relative to an instruction given by the court on the matter of intoxication.

The court instructed the jury that: "Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for that purpose it must be received with great caution."

This instruction should not have been given. It has no relevancy in a trial for burglary. The degree of crime in such a case is not measured by the mental condition of the defendant. Whether he was intoxicated or not is entirely a false quantity to be considered in determining the degree of guilt. The degree is determined solely by reference to the time the felonious entry into the building was made; if in the nighttime, it is burglary in the first degree,—if in the daytime, in the second degree. Intoxication has nothing to do with the degree. It is only relevant in considering the question of the intent with which the entry was made, and is to be considered by the jury for the sole purpose of determining whether the person accused was intoxicated to such an extent as to render him incapable of forming the specific criminal intent essential to constitute the crime.

But while the giving of such an instruction would be error in a case which properly called for a correct instruction with reference to intoxication as bearing on the question of the intent with which the entry into the building was made, yet in the case at bar the appellant has no ground to complain of the giving of the instruction in question.

It was not claimed by him upon the trial that he was intoxicated to such a degree as to render him incapable of forming such criminal intent in entering the building as was essential to constitute burglary. It is true he had been drinking during the day to a considerable extent. He was not sober, but he did not claim that he was so drunk as not to fully know all that happened during the entire afternoon and evening. He gave a full account of all that transpired during that period, with minute detail. It is only on this appeal that his counsel insists that one of the defenses of the appellant was that he was intoxicated on the night of the burglary. Several instructions were asked by the appellant to be given to the jury in his behalf, and they were given, but we find among them no requested instruction on this alleged defense. It is apparent from the entire record that no such defense was urged, and that it is only made now to take advantage of the instruction requested by the people and given by the court, but which was not relevant to any defense made on the trial.

The sole defense relied on by the appellant before the jury was, that he did not commit, or in any respect aid in, the commission of the burglary, or enter the room; that he was not with Smith when he entered it, knew nothing of his intention to enter it, did not in any manner participate in the offense, and was not near the Doty Block when it was committed. His defense was not that he did not commit the burglary, or, if he did, that he was intoxicated, but solely that he did not commit it or participate in it.

In fact, there is no evidence in the case showing that the appellant actually entered the room, and from the instructions of the court and the evidence in the case it would appear that the appellant was prosecuted and convicted upon the theory that, while he did not actually enter the room, he aided and abetted Smith in his entry of it and perpetration of the crime.

Several other errors are alleged, mainly in the admission of evidence, but we do not think they have any merit or require particular mention.

The judgment is affirmed.

McFarland, J., and Henshaw, J., concurred.

[L. A. No. 1075. In Bank.—December 31, 1903.]

J. L. HARRIS, Appellant, v. REFUGIO DUARTE et al,
Defendants; MARIUS BELLUE and MARIE BELLUE,
Respondents.

APPEAL—REVIEW OF EVIDENCE—SUFFICIENCY OF SPECIFICATIONS—GENERAL FINDINGS—ISSUES JOINED—CASE OVERRULED.—A specification of insufficiency of the evidence to support the findings is sufficient where it points to a particular finding, or if the motion for a new trial is directed against a general verdict or an *omnibus* finding that all or certain allegations of the complaint or answer are true, or, if there are no findings, the specifications need be no more specific than the issues distinctly made by the pleadings. [*De Molera v. Martin*, 120 Cal. 544, is overruled so far as holding to the contrary.]

ID.—ACTION TO QUIET TITLE—ULTIMATE FINDINGS AS TO OWNERSHIP—GENERAL SPECIFICATIONS.—In an action to quiet title, where the findings are merely general as to the ultimate facts of ownership by the defendants, and that plaintiff did not have title to the premises, specifications of insufficiency of the evidence to support each of these findings as made are sufficient to entitle the plaintiff to a review of the evidence upon appeal.

ID.—FINDINGS AGAINST EVIDENCE—TITLE OF ASSIGNEE IN INSOLVENCY—DECLARATION OF HOMESTEAD—LIMITED DESCRIPTION.—Where the appellant claimed title to the disputed premises under conveyance from an assignee in insolvency of the respondent's husband, and a declaration of homestead under which the respondents, husband and wife, claim, did not describe the disputed premises, though the husband in fact owned and resided upon the same, as part of his inclosure, the disputed premises were not exempt as a homestead from the claims of creditors, and findings that the respondents are entitled to the disputed premises, and that plaintiff is not entitled thereto, are against the evidence.

ID.—DEED BY ASSIGNEE IN INSOLVENCY—PROOF OF PROCEEDINGS NOT REQUIRED.—A party claiming title under a deed by an assignee in insolvency is not required in support of his deed to offer proof that the assignee made full report of his proceedings under the order of sale, and that the insolvency court made an order confirming the sale.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

Charles Lantz, and J. W. Swanwick, for Appellant.

J. Brousseau, for Respondents.

BEATTY, C. J.—This is an action to quiet title to a strip of land in Los Angeles, about one hundred and fifty feet in width, bounded on the north by Jefferson Street, and extending from Alameda Street on the east to the line of Glass's land on the west. In the tract bounded by Jefferson Street on the north, Alameda Street on the east, the land of Glass on the west, and the land of Stanway on the south, there are approximately eleven and a half acres, and the strip in controversy, containing about one and one half acres, is bounded on the south by the north line of the southernmost ten acres of the whole tract. Numerous parties were named as defendants, but as to some the action was dismissed. Others were defaulted and others disclaimed, so that there remained as contestants of plaintiff's title only Bellue and wife. Upon a trial of the issues, the superior court found in their favor, and plaintiff appeals from an order denying his motion for a new trial.

The principal ground of the motion was insufficiency of the evidence to support the findings of fact,—i. e. that Bellue and wife had, and that plaintiff did not have, title to the premises; and the main contention of appellant is, that the superior court erred in refusing to grant a new trial on this ground. Respondents object to any consideration of the evidence in the record upon the ground that the statement on motion for new trial does not purport to contain all the evidence and does not specify the particulars in which the evidence is insufficient to sustain the findings. We think, however, that the specifications are entirely sufficient. They are as specific as the findings themselves, which, it is true, are of the ultimate facts of ownership, and absence of ownership. The findings may be obnoxious to the rule stated in *De Molera v. Martin*, 120 Cal. 544, but that rule has not been followed in any recent case. I have never deemed it a correct rule, and in the opinion of Justice Shaw, concurred in by Justices Henshaw and Angellotti, in the case of *Bell v. Staacke*, decided November 30th last (*ante*, p. 186), it is unequivocally rejected. It may therefore be understood

that *De Molera v. Martin* is, as to this point, overruled. A specification is sufficient when it points to a particular finding, or if the motion is directed against a general verdict, or an *omnibus* finding that all or certain designated allegations of the complaint or answer are true, or a judgment without findings, in any such case it need be no more specific than the issues distinctly made by the pleadings.

Among the facts clearly established by uncontradicted evidence were the following: By a deed made and recorded August 2, 1886, Frederico Pena conveyed to Marius Bellue the southernmost ten acres of the tract of land bounded on the north by Jefferson Street, south by lands of Stanway, west by lands of Glass, and east by Alameda Street; that is to say, he conveyed the south ten acres of the tract containing eleven and a half acres. Upon receipt of this deed Bellue entered into possession of the whole of the eleven and a half acres, inclosing in one body not only the ten acres described in the conveyance from Pena, but also the strip about one hundred and fifty feet wide lying between his ten acres on the south and Jefferson Street on the north. He seems to have supposed that his deed covered the entire tract, and Pena does not seem to have made any claim to the contrary. At all events, Bellue claimed the whole, paid taxes on the whole, and constructed his house—a dwelling and store—at the corner of Jefferson and Alameda streets, quite outside of the ten acres described in Pena's deed. In this house he was residing with his wife and three children on May 10, 1894, when his wife made and filed a declaration of homestead, the material portion of which reads as follows: "Know all men by these presents: That I do hereby certify and declare that I am the wife of Marius Bellue, and that I do now, at the time of making this declaration, actually reside with my husband and children on the land and premises hereinafter described. That the land and premises on which I reside are bounded and described as follows, to wit: Being the southernmost 10 acres of that certain tract of land in the southeast quarter of section nine, township two south, range 13 west, S. B. M., bounded on the north by Jefferson Street, or road, on the south by lands lately or now owned by J. S. Stanway, on the west by lands occupied by one Glass; and east by Alameda Street or road."

It will be observed that this is the same description contained in Pena's deed, and that it does not cover the land upon which Bellue's house was situate or any portion of the strip in controversy, unless the boundaries given can be drawn to the line of Jefferson Street by the statement that the land described was the land on which the declarant was residing. But this we do not think can be done. A declaration of homestead must contain a description of the premises claimed, and a statement that the person making it is residing on the premises described. (Civ. Code, sec. 1263.) If the declarant makes a mistake and gives a description of land upon which she does not reside, her statement that she resides upon the land cannot enlarge its boundaries. The strip in controversy was therefore not exempt as a homestead from the claims of creditors. This being its condition on May 12, 1894, Bellue filed his voluntary petition in insolvency under the state law. On the same day he was adjudged insolvent, and in due course transferred all his property to his assignee, from whom plaintiff derives title to the strip in controversy by various mesne conveyances.

Upon this evidence we cannot see how the finding of the superior court in favor of Bellue and wife can be sustained. The premises were not covered by the homestead, and passed to the assignee in insolvency, and from him by regular conveyances to the plaintiff.

There is some question made by respondent as to the validity of the assignee's deed, based upon the absence of proof that he made a full report of his proceedings under the order of sale, and the failure to offer proof that the insolvency court made any order confirming the sale preliminary to the execution of the assignee's deed. We are not cited to any law, and we are not aware of any, which requires a party making title under an assignee in insolvency to offer proof of these matters in support of his deed.

The order appealed from is reversed, and the cause remanded.

Shaw, J. Angellotti, J., McFarland, J.
Lorigan, J., Henshaw, J.

Van Dyke, J., dissented and adhered to the opinion rendered in Department One.

The following is the opinion of Department One rendered on the 8th of October, 1902, and adhered to by Mr. Justice Van Dyke:—

VAN DYKE, J.—Action to quiet title and judgment for certain of the defendants.

The appeal is from an order denying plaintiff's motion for a new trial. Appellant relies upon errors of law occurring at the trial, consisting in overruling plaintiff's objection to the admission of evidence showing prescriptive title in the defendants Bellue, and in admitting a declaration of homestead made by the defendant Marie Bellue also upon the ground that the evidence is insufficient to justify the findings. It was in issue that the respondents claimed title to a portion of the premises described in the plaintiff's complaint. It was competent and relevant, therefore, to introduce testimony in support of a prescriptive title, as well as a title by deed. Occupancy for the period prescribed by law as sufficient to bar an action for the recovery of the property confers a title thereto, denominated title by prescription, which is sufficient against all. (Civ. Code, sec. 1007.) The testimony was proper also to aid the court in construing the declaration of homestead as to the description of the premises. The declaration in the usual way states that the party making it at that time actually resided with her husband and children on the land and premises therein described (then giving the description), from which description the appellant contends the homestead property did not extend to Jefferson Street. Defendant Bellue testified that he with his wife resided at Jefferson and Alameda streets in the city of Los Angeles; that he went on those premises in 1889, and fenced around the property, cultivated it, built a house on the corner of Jefferson and Alameda streets; that he lived there continuously from that time; and that he was the husband of Marie Bellue at the time of the declaration of homestead, and that she lived on the premises with him as his wife, with their children. He also introduced state, county, and city tax-receipts from 1888-1889 up to the date of the trial in 1900, describing the premises as a quarter-acre bounded north by Jefferson Street and east by Alameda Street. Appellant contends that a prescriptive title would not avail the defendants unless the pos-

session continued longer than five years after the filing of the petition in insolvency of defendant Marius, May 12, 1894; but the proceedings in insolvency did not affect the homestead, as that was exempt under the law, and the schedule in the inventory, after giving a description of the property, states that "the foregoing is subject to declaration of homestead by Marie Bellue, wife of petitioner"; and the deed of the assignee in insolvency to the grantor of plaintiff could not convey the homestead tract, even if it purported to do so.

Appellant contends that the evidence does not support finding II, to the effect that the plaintiff is not the owner of the land therein described, as against the respondents, and that there is no determination by the court as to who is the rightful owner of that portion of the property sued for, not embraced in said finding II. The finding referred to is to the effect that the respondents were the owners of the premises therein described,—to wit, the homestead property on the corner of Jefferson and Alameda streets, already referred to.—and that the plaintiff had no right, title, or interest in or to the same. Finding III is to the effect that the plaintiff is the owner of the land described in the complaint as against all the defendants excepting the respondents, and as to them, except that part thereof which is described in finding II. It cannot be said that the findings are not supported by the evidence, and the statement on motion for a new trial does not purport to contain all the evidence, and, if any evidence is omitted, it will not be presumed to be adverse to the finding of the court.

[L. A. No. 1124. In Bank.—January 2, 1904.]

L. M. BIGELOW, Appellant, v. CITY OF LOS ANGELES,
Respondent; M. J. NEWMARK et al., Interveners, Re-
spondents.

EMINENT DOMAIN—OPENING OF PUBLIC STREET—STIPULATION—INJUNCTION SUIT—DELAY OF TRIAL—LOSS OF EQUITABLE RELIEF.—Where by stipulation entered into at the trial of an action to condemn land the condemnation had become final, it being also stipulated that an ordinance should be passed to vacate an alley as a street or thoroughfare, and an injunction was sought to restrain the opening of the street over plaintiff's land until a valid ordinance should be passed as stipulated, but no injunction was enforced, and for seven or eight years before the trial of the suit the street had remained open and occupied as a public street, and plaintiff paid assessments on her property for its improvement, the plaintiff was not entitled upon the delayed trial of the injunction suit to the equitable relief sought.

ID.—DAMAGES—ABSENCE OF ISSUE—PLEADING—CLAIM NOT PRESENTED TO COUNCIL—NEW TRIAL.—Where no issue was raised on the trial upon the question of damages, and the plaintiff merely sought to sustain her prayer for an injunction by an averment that she would be damaged in the sum of ten thousand dollars by failure to vacate the street, as stipulated, or to sustain the injunction sought, and where no claim for damages was presented to the city council, as required by the city charter, a new trial cannot be granted to try the question of damages.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial.

The facts are stated in the opinion.

McNutt & Hannon, and A. W. Hutton, for Appellant.

W. B. Mathews, Attorney for City of Los Angeles, Respondent.

J. S. Chapman, for Juana Larronde, Intervener, Respondent.

M. J. Newmark, Intervener, Respondent, *in pro. per.*

GRAY, C.—Plaintiff owns a lot of land in the city of Los Angeles, said lot being about one hundred and fifty-five feet

north and south and one hundred and five feet east and west, and bounded on the north by the plaza, on the east by Negro Alley, and on the west by an alley ten feet wide, running along the westerly line of Engine House No. 38. In 1887 the defendant city commenced an action against the plaintiff herein, Mrs. Bigelow, to condemn a right of way over and covering the greater portion of this property for the extension of Los Angeles Street north to the plaza. While said action was pending, and before any proceedings had been taken to ascertain the damage to be paid for condemning the said land, the plaintiff city and defendant Mrs. Bigelow entered into a written stipulation disposing of the question of damages as follows:—

“It is hereby stipulated and agreed by and between the city of Los Angeles and the said L. M. Bigelow, respective parties to said action:

“(1) That the purchase price to be paid for the strip of land sought to be condemned and to be taken for public use as a public street of the said city, is the sum of \$12,000.

“(2) That the said sum of \$12,000 shall be deposited by said city in the court, or any portion of such sum not so deposited shall be secured by good and sufficient bond, executed by and and that the same shall be paid over, or the said bond be conditioned that the money be paid over to the said L. M. Bigelow, upon the passage of said two several orders or ordinances hereinafter mentioned.

“(3) That immediately upon an order or ordinance being passed by the council of said city, declaring said proposed Los Angeles Street opened as a public street of said city, the said city shall pass an order or ordinance abandoning and vacating Negro Alley as a street or thoroughfare, and disclaim all right, title, or interest, in fee or otherwise, in, over, along, or upon any portion of the strip of land lying to the east of the said proposed easterly line of the said Los Angeles Street.”

This stipulation was dated December 16, 1887, was filed in the condemnation proceedings, and thereupon a decree of the court was entered declaring Los Angeles Street open. Thereafter, on motion of Mrs. Bigelow, the court stayed further proceedings until the city should be able to secure, according to the terms of the stipulation, “the whole amount of \$12,000 without any deduction or offsets by assessments or otherwise.”

The matter remained in that condition, as is alleged by plaintiff herein, to her great damage in consequence of the delay, until the 6th of September, 1888, when the city finally paid over to Mrs. Bigelow \$12,000 as the purchase price of said land taken. Thereupon, Mrs. Bigelow, through her attorneys, entered into another stipulation as follows:—

“We hereby consent that the order heretofore entered may be set aside, and that said decree may be declared final in the premises, and further that plaintiff may take possession of the land sought to be condemned, and use the same as a public street of said city forever.

“It being understood that immediately upon the entering of the decree herein the council of said city shall pass an ordinance declaring Los Angeles Street open, and vacating Negro Alley as provided in the stipulation heretofore filed in this case.”

This stipulation was in turn filed; and thereupon the city passed an ordinance declaring Los Angeles Street open, and also some time thereafter passed what purported to be an ordinance vacating and closing Negro Alley. Thereafter Mrs. Bigelow claiming that the last-named ordinance was a nullity, commenced this suit to restrain the city from further entering upon her land and premises, until, through its council, it should pass an ordinance vacating and abandoning Negro Alley as a public street. In her complaint she alleged the facts substantially as above set forth, and also alleged that the city had failed and refused to pass an ordinance vacating Negro Alley. She further alleged that it was among the main considerations moving the plaintiff to the stipulations that Negro Alley should be vacated and abandoned by the defendant; and that this was so for the reason that she would have left without the abandoning of the alley only a narrow wedge-shaped strip of land between Los Angeles Street and the alley only a few feet wide at the south end, and running to a point at the north some thirty feet before reaching the plaza, and that, without the abandonment of the alley and the consequent right to use the west half of the alley in connection with this narrow strip, the same would be practically useless for any purpose, and the plaintiff would suffer damage in the sum of ten thousand dollars over and above the amount already paid her.

Plaintiff prayed for an injunction against the city restraining it from entering upon or in any way using the said land and premises of plaintiff in said Los Angeles Street until the said city should pass an ordinance vacating Negro Alley and for such other and further decree as may seem meet and proper. There is no allegation in the complaint that plaintiff presented any claim for those damages to the city council. Thereafter the defendant answered the complaint, and certain property-owners along Negro Alley intervened, and their complaints were in turn answered, and upon the issues thus made the case went to trial before the court without a jury, and the findings and judgment were against the plaintiff, dismissing her action.

The plaintiff appeals from an order denying her motion for a new trial. There is no appeal from the judgment.

The equitable relief in the nature of an injunction prayed for by plaintiff could not be properly granted by the trial court on the showing made before it. It was shown by the stipulations entered into at the trial of the case that the judgment condemning the land for Los Angeles Street had become final with the consent of the plaintiff, and that after the commencement of this suit, and some seven or eight years before the trial of it, Los Angeles Street had been opened and graded, and during all those years it had remained an open public street, used and occupied as such, and plaintiff had made no effort to enforce any injunction against it, but, on the contrary, paid assessments on her property for the improvement of this street in seeming acquiescence in the use thereof as a public street. The findings are in accordance with these stipulations. It is not strongly contended by appellant that she is entitled to have the equitable relief prayed for; and in view of these stipulations and findings it cannot be plausibly so contended.

Plaintiff's main contention, as here urged, is, that she is entitled to damages on account of the city not fulfilling its contract to close Negro Alley, and that the court should have granted her a new trial that she might obtain those damages. The trouble with this contention is, that an examination of the record shows that this was not an action for damages. No damages were demanded in the complaint; and there was no allegation in it to the effect that plaintiff *had* suffered any

damage. The allegation as to ten thousand dollars damages was conditioned upon the refusal of the injunction, and was intended only to satisfy the requirement that the complaint in suit for an injunction must show that substantial damages will result if the injunction is not granted. Furthermore, there was nothing in the stipulations or other evidence, nor was there anything in the pleading, to show that any claim or demand for any damages had been presented to the council of the city of Los Angeles. In order that the suit might be treated as one for damages it was absolutely necessary that a claim therefor should have been so presented to the council. (City Charter of Los Angeles (Stats. 1889, p. 510), sec. 222; *Alden v. County of Alameda*, 43 Cal. 270; *Rhoda v. Alameda County*, 52 Cal. 350; *Bancroft v. City of San Diego*, 120 Cal. 432; *McCann v. Sierra County*, 7 Cal. 121.) There was no case for damages presented by the pleadings, and no issue of that kind tried. Can it be said that the court should have granted a new trial as to an issue that had never been tried and was not before the court? We think not. We are not holding that the complaint failed to state a cause of action, but only that the pleadings presented no issue as to a cause of action for damages, and that there can be no new trial of an issue which is not presented by the pleadings in the case. Not being in a position to obtain damages on account of failure to show presentation of claim therefor, and not being entitled to equitable relief, a new trial was properly denied her.

Some of the findings of the court are perhaps unsupported by the evidence, but these findings become immaterial in view of the stipulations and other findings showing that plaintiff is not entitled to have the equitable relief to which they relate.

We advise that the order denying a new trial be affirmed.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order denying a new trial is affirmed.

Angellotti, J., Lorigan, J., McFarland, J., Henshaw, J.

[S. F. No. 2741. In Bank.—January 4, 1904.]

CHARLES G. WILLEY, Respondent, v. THE CROCKER-WOOLWORTH NATIONAL BANK, Appellant.

PARTNERSHIP—USE OF FIRM NAME BY INDIVIDUAL.—An individual may conduct his business under any designation he sees fit; and in the absence of any statute of this state forbidding the use of a firm name as a trade-name by an individual, there is no necessary or conclusive presumption that the words “& Co.,” used after a dealer’s name, import that he has a partner or partners, or that such title includes more than one person.

ID.—REPRESENTATION TO BANK—CREDIT TO INDIVIDUAL—SET-OFF OF PERSONAL NOTE AGAINST FIRM ACCOUNT—SECRET PARTNERS.—Where an individual who commenced business in a firm name stated to the cashier of a bank, with whom he sought to open a deposit account in such name, that he was the sole owner of the business, and never notified the bank to the contrary, and afterward formed a secret partnership with other parties in the same firm name, with the agreement that the names of the other partners should not be disclosed, but should be kept secret, and subsequently borrowed money from the bank in his individual name, the bank is entitled as against such secret partners to set off said note against the deposit account standing in the firm name.

ID.—ESTOPPEL OF DORMANT PARTNER.—Where a dormant partner permits the business world to believe that the ostensible partner is the sole owner of the business, he is estopped from claiming the contrary against those who have in good faith acted upon such appearance, and cannot be heard to insist that a creditor has not the right to set off his debt against such ostensible partner.

ID.—PLEA OF ESTOPPEL—WAIVER OF OBJECTION—APPEAL.—Where there was an attempt in the answer to plead facts constituting an estoppel, and evidence was received under it without objection to the pleadings, and the case was tried on the theory that the plea was sufficiently made, objection to the pleading was waived and cannot be urged upon appeal for the first time.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. F. J. Murasky, Judge.

The facts are stated in the opinion of the court.

Henry E. Monroe, Monroe & Cornwall, and Lloyd & Wood, for Appellant.

A corporation cannot enter into a partnership with a pri-

vate person. (*Whittenton Mills v. Upton*, 10 Gray, 582;¹ *Gunn v. Central R. R. Co.*, 74 Ga. 509; *Central Ry. Co. v. Smith*, 76 Ala. 133; *Aurora State Bank v. Oliver*, 62 Mo. App. 390-393; *Burke v. Concord R. R. Co.*, 61 N. H. 160-247; *Culvert v. Idaho Stage Co.*, 25 Or. 45; *Bates on Partnership*, 133, *Green's Ultra Vires*, 2d ed., p. 423.) There is no presumption that a firm name includes more than one person. (*Robinson v. Magarity*, 28 Ill. 423; *Brennan v. Partridge*, 67 Mich. 453.) One who is silent when he ought to speak will be prevented from speaking when he ought to keep silent. (*Bigelow on Estoppel*, 587.) A silent partner cannot prevent a bank from applying money received from the partnership for deposit to a debt of the only ostensible partner. (*Allen v. Brown*, 39 Iowa, 330.) The sufficiency of the pleading cannot be objected to for the first time upon appeal. (*Tulley v. Tranor*, 53 Cal. 274.)

Crandall & Bull, and H. M. Barstow, for Respondent.

The defendant is estopped from questioning the validity of the partnership which made the deposits. (*French v. Donohue*, 29 Minn. 111; *Yancy v. Morton*, 94 Cal. 560.) A corporation may be a member of a partnership. (*Catskill Bank v. Gray*, 14 Barb. 479; *Butler v. American Toy Co.*, 46 Conn. 136; *French v. Donohue*, 29 Minn. 111; *Allen v. Woonsocket*, 11 R. I. 388.) There is no estoppel of the plaintiff to claim the deposits, for want of the necessary elements of estoppel. (*Boggs v. Merced etc. Co.*, 74 Cal. 367; *Barnhart v. Fulkerth*, 93 Cal. 497; *Becker v. Becker*, 102 Cal. 228; *Murphy v. Clay-ton*, 113 Cal. 153, 160.)

LORIGAN, J.—This is an appeal from a judgment on a bill of exceptions.

Appellant attacks the sufficiency of the evidence to sustain the findings upon which judgment for respondent was entered.

The facts are substantially as follows: One, A. B. Perry, some time in the latter part of 1896 (the record does not disclose the exact date), went to the banking-house of the Tal-lant Banking Company, in San Francisco, for the purpose of opening a deposit account with said bank in the name of A.

¹ 71 Am. Dec. 681.

B. Perry & Co. He stated to the cashier of the bank at the time that he was the sole owner of the business of A. B. Perry & Co., and had no partner; that he was going to open up his business in that style, and under the name of A. B. Perry & Co., and run the business that way for the appearance of it; that he preferred to do it in that manner, as he thought it gave him a little strength; that he expected to take a partner in, and when he did so he would not have to make any change.

That, on January 1, 1897, the said A. B. Perry and W. P. Fuller & Co., a corporation, entered into articles of copartnership under the firm name and style of A. B. Perry & Co., that such articles provided, among other things, that said W. P. Fuller & Co., or its employees, should not be required to give their time or services to the conduct of such business, but that A. B. Perry should give his entire time and attention to it. The articles further provided for the keeping of books of account, and in that regard specially stipulated that, "said books shall be kept in the name of A. B. Perry & Co., and the name of W. P. Fuller & Co. shall not appear therein, but shall remain and be kept secret and undisclosed by the parties hereto. The account of W. P. Fuller & Co. in this copartnership shall be kept in the name of 'Private Partner,' and all credits and debts belonging to said W. P. Fuller & Co. as partner, shall be kept in said name."

That, after the formation of such partnership the deposit account stood in the name of said A. B. Perry & Co., with said Tallant Banking Company, and in August, 1897, the said A. B. Perry individually borrowed from the said Tallant Banking Company the sum of sixteen hundred dollars, for which he gave his personal note, payable ninety days after date. In November, 1898, said Tallant Banking Company transferred to defendant certain of its assets, including the said note, and thereupon defendant assumed certain liabilities of the Tallant Banking Company, including the liability for the deposit to the credit of A. B. Perry & Co. The said deposit account was thereafter kept by defendant with said A. B. Perry & Co., but said A. B. Perry had no individual deposit with defendant at any time.

When the transfer of the account and note was made from the Tallant Banking Company to the defendant bank, the cashier of the former informed the officers of the latter of the

statements A. B. Perry had made when he first appeared at the bank as to his sole ownership of the business, that he had no partner, and stated the reasons he gave why he wished to conduct the business under the firm name of A. B. Perry & Co.

That neither the Tallant Banking Company, nor the defendant bank ever had any actual notice that A. B. Perry & Co. represented a partnership, or that A. B. Perry had a partner, or that any one other than said A. B. Perry was interested in the business conducted under such name.

That, on February 14, 1899, there was on deposit to the credit of A. B. Perry & Co. with the defendant the sum of \$1,720.64, and on that day defendant charged said account with the sum of \$1604.94, being the amount due on said note of A. B. Perry. This was done without any request from said A. B. Perry, or A. B. Perry & Co., and solely on account of the fatal illness of said A. B. Perry, reported to the defendant.

Said A. B. Perry having subsequently died, W. P. Fuller & Co., claiming to be the surviving partner of A. B. Perry & Co., demanded the delivery to it by defendant of the entire \$1,720.64, and being refused assigned its claim to plaintiff for collection.

The lower court found "that the defendant did not know A. B. Perry to be alone in business under such firm name; that, after January 1, 1897, he did not hold himself out as the sole member of said A. B. Perry & Co., nor as the sole owner of the business conducted under that name, nor was he after that date so known or considered in the business world."

And found also that "the defendant did not give said A. B. Perry credit, or accept his promissory note because of, or in reliance upon, the fact that A. B. Perry was alone the owner of the deposit account standing in the name of A. B. Perry & Co."

It is insisted by the appellant, that these findings are not supported by the evidence, and we have come to the same conclusion. They are not only not so supported, but the evidence directly shows the contrary.

While the exact date when A. B. Perry opened his account with the Tallant Banking Company is not shown, it is fairly

inferable from the evidence that he had opened it somewhat prior to the agreement of partnership between himself and W. P. Fuller & Co.; that he was then the sole owner of the business, and so declared himself to the cashier of the bank, giving his reason for adopting the name and style of A. B. Perry & Co.

There is not a particle of evidence to show, that from that date, A. B. Perry ever acquainted the Tallant Bank, or the defendant bank, that his relation to the business of A. B. Perry & Co., had changed, that he had a partner, or had entered into partnership, or that W. P. Fuller & Co. was in any manner interested in the business.

Neither did W. P. Fuller & Co. at any time until after Perry's death notify either of them of its interest in the business as a partner. Nor is there any evidence showing that even an intimation was conveyed to either banking-house that Perry was not, at all times, the sole owner of the business.

In fact, it would have been a violation of the articles of agreement for A. B. Perry or W. P. Fuller & Co. to have informed anybody that such a partnership existed. The agreement between them expressly provided that their partnership should be kept a secret. The presumption is, that men keep their agreements, and in the case at bar it appears to be the fact that both of them kept theirs, and that A. B. Perry, having in the beginning stated that he was the sole owner of the business without a partner, sedulously thereafter avoided informing either the Tallant bank, or the defendant bank to the contrary. Aside from depositing and checking against his account, he had but few dealings with the officers of either bank, but those he did have tended to confirm their belief in his original declaration that he was the sole owner. To illustrate, in 1898, contemplating a trip east, he called at the Tallant bank, and stated that while east he might make some purchases and want to overdraw his account; to meet such overdrafts he desired to leave blank notes with the bank, giving as a reason therefor, that, while his bookkeeper could sign checks, there was no one who could sign notes for him. The bank declined to receive such notes, and other arrangements were made. When the transfer of the account from the Tallant bank to the defendant bank was made, the identification signature furnished to the bank by Perry, upon which

alone it should honor checks, was that of A. B. Perry & Co., signed by A. B. Perry.

Both these transactions were confirmatory of his original declaration of individual ownership; that he alone could draw checks was equivalent to saying that he alone still owned the business; that there was no one who was authorized to sign notes for him, even to meet the exigencies of the business while he was away, warranted the natural inference that he was solely interested in it, and excluded the idea of his having a partner.

Not only does the whole trend of the evidence tend to show that, as far as the Tallant bank, or the defendant bank is concerned, they knew A. B. Perry as the sole owner of the business represented by the style and name of A. B. Perry & Co., but the plaintiff made no effort to show that any information to the contrary was brought to the attention of either.

The trial court seems to have attached some importance to the fact that the defendant bank, after the transfer to it by the Tallant Banking Company of the account of A. B. Perry & Co., "received its deposits and honored its checks without prosecuting any inquiry as to the membership of such copartnership."

But there was nothing calling for such inquiry. No conclusive presumption arose from the use of the term "& Co.," in connection with A. B. Perry, which imported the existence of a copartnership. It is a matter of common observation that persons do business frequently under what is known as a trade-name, adopted for the purpose of giving them an apparent standing in the business community. This is the idea Perry had in view. He selected it, doubtless, as a trade-name, and because, as he stated to the Tallant bank, he "thought it gave him a little strength."

It does not necessarily follow as a presumption from the use of such a business designation that more than one person is interested in the business, or that any other than the one whose name is given is so interested. The business world looks chiefly to the individual actually mentioned in the business appellation until it discovers or is informed that others are interested in the business with him. There is no law of this state which prevents the use of a trade-name by an individual,

and in the absence of any such prohibition an individual may conduct business under any designation he sees fit. As is stated in *Brennan v. Partridge*, 67 Mich. 453, "In a state where there is no statute prohibiting the use of a name or an abbreviation to do business under other than that of the individual, there is no necessary presumption that when '& Co.' is made use of after the dealer's name, he has a partner or partners, or that such title includes more than one person."

Aside from this, the Tallant Banking Company did make inquiry at the time when inquiry should properly have been made, when the account was proposed by Perry to be opened, and had been informed by him that he was the sole owner. Nothing arose subsequently to awake suspicion upon the part of the Tallant Banking Company as to the accuracy of this statement, and, as far as the defendant is concerned, it must be borne in mind that all the rights which had accrued in behalf of the Tallant bank against Perry or A. B. Perry & Co., represented by Perry as sole owner, passed to the defendant by its assumption of such account, and the transfer of the note to it.

It cannot be questioned that, if the Tallant bank had the right to offset this note against A. B. Perry & Co.'s account, such right passed to the defendant bank under the transaction between them. Nothing certainly arose prior to the transfer by the Tallant bank to require any additional inquiry on its part. Neither, if that fact could affect its rights at all, did anything arise to call for inquiry by the defendant bank. It had a right to rest on the statements which Perry had made to the Tallant bank as to his ownership of the business, and of which it was informed when the transfer of the account and note were being negotiated. Besides, this inquiry is only required when such inquiry would have disclosed the facts. If inquiry had been made of the business community, it could have imparted no information other than that A. B. Perry was the owner of the business, because, under the partnership agreement, the actual management of it was left to him alone, and it was provided by the same instrument that the fact that Fuller & Co. was a partner should be kept concealed by both of them, and the presumption is that they kept their agreement.

Nor would subsequent inquiry of Perry have been attended with any better results. He was bound by the contract equally with Fuller & Co. to conceal the existence of the latter as a member of the firm, and if inquiry had been made, doubtless would have done so. In fact, his whole course of conduct shows that he lived up to the agreement in this particular.

Under these circumstances it is apparent, that any inquiry made would be fruitless, without considering whether it lies in the mouth of Fuller & Co. to now complain of a failure to make inquiry concerning a fact which it had so cautiously provided should be kept secret and undisclosed.

Some importance is attached to the fact that, after business relations were established between A. B. Perry & Co., and the defendant bank, a loan was negotiated for three thousand dollars by A. B. Perry with the latter, and a note given executed by him in the firm name of A. B. Perry & Co. This note was paid. It is argued from the execution of this note in the firm name that the bank must have dealt with A. B. Perry & Co. as a partnership. We do not think this circumstance entitled to the importance which is claimed for it. As the bank understood and believed A. B. Perry and A. B. Perry & Co. to be the same, it would be a circumstance of no moment with it whether the note was signed by A. B. Perry or A. B. Perry & Co. Under either signature it would represent, in their belief, simply A. B. Perry the individual, and taking it in the manner in which it was executed may have been entirely for the convenience of Perry. As far as the bank was concerned, it knew no difference between the individual and the firm.

As to the finding "that the defendant did not give A. B. Perry credit, nor accept his promissory note because of, or in reliance upon, the fact that he was alone the owner of the deposit account standing in the name of A. B. Perry & Co.," we are satisfied also that the evidence is entirely to the contrary.

In determining whether the evidence supports this finding it is not alone sufficient to examine the relations existing between A. B. Perry and the defendant, but there must be also taken into consideration the transactions previously had between the Tallant bank and A. B. Perry, because as we have

said, whatever rights had accrued in favor of the Tallant bank, at the time of its negotiations with the defendant resulting in the transfer of the note and the assumption of the liability on the deposit account, passed to the defendant. The note was then due, and if, under the law upon the facts then existing, the Tallant bank had the right to set off the note against the account, it passed to the defendant. That the Tallant bank credited Perry and accepted his note in reliance upon the fact that he alone, as he stated, was the owner of the deposit account, we think has been clearly shown.

When the transfer of the deposit account and note were being negotiated, it was stated to defendant by Mr. McKee, cashier of the Tallant bank, "that along with this note would come, among the other deposits, accounts to be transferred, an account of A. B. Perry & Co. . . . That the note and account were one and the same thing, and we had a number of borrowers who borrowed money and kept money to their credit. . . . I stated in general terms the nature of the business. I told them that Mr. Perry was doing business under the firm name of A. B. Perry & Co., because he told me that he preferred to do it that way; he thought it gave him a little strength; that he was the sole owner of the business. That knowledge I got from Mr. Perry himself." And the cashier of defendant bank, Mr. Kline, testified: "In the acceptance of these notes and security that were turned over to us by Tallant Banking Company, I acted upon the statement and representations made to me by Mr. McKee." This evidence, to our mind, about which there is no contradiction, fully establishes, not only that the Tallant bank originally took said note on the faith of A. B. Perry's declaration that he alone owned the business of A. B. Perry & Co., and as a consequence the account standing in the name, but that the defendant took it, and intended to take it, with all the legal rights which existed in favor of such Tallant bank. It is hardly necessary to say that when, under such circumstances, a person says he acted upon the statement and representation of another in a business transaction, that he is understood to mean that he relied upon them.

We have discussed these findings, and the evidence bearing on them, because the defendant, as a defense to the claim of plaintiff, insisted that it had a right to set off said note against the amount due on said account for the reason that it believed, and was justified in believing, that A. B. Perry was the sole owner of the business represented by A. B. Perry & Co.; that it did not know that any other person than A. B. Perry was a member or interested in said business, and that the corporation of W. P. Fuller & Co. was estopped from claiming any interest in said deposit fund adverse to the right of defendant to set off said note against it.

The findings of the court which we have called attention to negative this claim. The evidence in the case, which we hold is directly contrary to the findings, support it.

No one will claim that, if in fact A. B. Perry was the sole owner of such business, the right of set-off as exercised was not available to the defendant.

It is equally available when, from the facts of a case, it appears that the surviving partner is a dormant, or secret partner, who permits or authorizes his copartner to hold himself out as the sole member of the partnership, and on the faith of that appearance to obtain credit. This is the relation—a dormant and secret partner—which W. P. Fuller & Co. bore to the firm of A. B. Perry & Co., and the rule is elementary that, where a dormant partner permits the business world to believe that the ostensible partner is alone the owner of the business, he is estopped from claiming to the contrary against those who have, in good faith, acted upon such appearance, and cannot be heard to insist that a creditor under such circumstances has not the right to set off his debt against such ostensible partner. On this point it is only necessary to refer to the text-books. (Collyer on Partnership, p. 1099, and note; 1 Lindley on Partnership, p. 686; Bates on Partnership, sec. 1093; Barbour on Set-Off, pp. 56, 62, 103; Waterman on Set-Off, sec. 238. Though the cases are to the same effect: *Lord v. Baldwin*, 6 Pick. 352; *Van Valen v. Russell*, 13 Barb. 592; *Allen v. Brown*, 39 Iowa, 330; and *Brown's Appeal*, 17 Pa. St. 484.)

The case at bar comes squarely within the rule. Under the terms of their partnership agreement, such partnership was

not only to be secret, but it was to be kept secret. Perry, as the active manager of the firm, was to mingle with the business world ostensibly as the sole owner of the business. It was intended that he alone should be known in it, and was empowered from his very position under the terms of the partnership to deceive the public as to the true state of affairs, and authorized to make any representation which would induce those with whom he dealt to believe him the sole owner of the business. Fuller & Co. knew the inner conduct of their own firm, that business relations would naturally be established in various quarters, and that they were actually established with the Tallant bank and with the defendant; that inquiries would be made as to whom A. B. Perry & Co. represented. It was intended that his should not be disclosed, and Perry was enjoined not to do so. This necessitated actual deception if inquiry would be made, or such a course of conduct as would tend to suggest individual ownership and prevent inquiry. By its own act Fuller & Co. placed Perry where such deception could be practiced. In so doing it constituted him its agent, became bound by his representations, and is now estopped to question the truth of them against one who acted upon them in good faith. Fuller & Co. voluntarily assumed this secret relationship, and made the deception possible, and it is only just that it should suffer by reason of it rather than an innocent creditor who through its conduct was deceived as to the true condition of affairs.

It is insisted by the respondent that estoppel was not pleaded. As we construe the answer, there was at least an attempt to do so. Some facts tending to establish an estoppel are pleaded. No demurrer to the answer was filed or objection made to the introduction of evidence under it. The case was tried upon the theory that the plea was sufficiently made. Under these circumstances, the objection was waived, and cannot now for the first time be urged here. (*Hughes v. Wheeler*, 76 Cal. 230; *Davis v. Davis*, 26 Cal. 23.¹)

Appellant makes the additional point that W. P. Fuller & Co., being a corporation, could not legally enter into a co-partnership with an individual, and for that reason no partnership ever existed between A. B. Perry and W. P. Fuller

& Co. The disposition we make of the case upon a review of the findings under the evidence makes it unnecessary to discuss this point.

The judgment is reversed and the cause remanded for a new trial.

Henshaw, J., McFarland, J., Shaw, J., Angellotti, J., Van Dyke, J., and Beatty, C. J., concurred.

[S. F. No. 2424. In Bank.—January 5, 1904.]

A. H. BAILY, Jr., et al., Appellants, v. HENRY KREUTZMANN, Respondent.

NEW TRIAL—DELAY IN SERVING STATEMENT—EXCUSABLE NEGLIGENCE.—

The court has authority, upon a proper motion made therefor, to relieve a party moving for a new trial for his failure to serve the statement in time, on the ground of excusable neglect. And where such motion is granted and afterwards the new trial is denied, the appellate court will not presume that the denial was based on the ground of the delay in the service of the proposed statement.

ID.—EVIDENCE—MEDICAL EXPERTS—EXTRACTS FROM BOOKS INADMISSIBLE.—A medical expert cannot, on direct examination, recite instances from medical reports and authors illustrating the difficulties attending the diagnosis of a case similar to the one involved in the trial. Medical works are hearsay and inadmissible in evidence, except on cross-examination, when a specific work may be referred to, to discredit a witness who has based his testimony upon it.

ID.—NEGLIGENCE—PHYSICIAN—INSTRUCTIONS.—In an action against a physician, in which the complaint charged the defendant with negligence and want of skill in treating the plaintiff, an instruction as follows, "The defendant in this action is not charged by the plaintiffs with any lack of general skill or competency as a physician and surgeon. This amounts to an admission, and you are bound to hold accordingly, that the defendant was possessed of that ordinary medical and surgical knowledge and skill which the law requires him to possess; there being no degree other than that of ordinary knowledge and skill recognized by law as a standard or applicable as a measure of knowledge and skill in such cases,"—is erroneous.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

J. J. Burt, for Appellants.

Loewy & Gutsch, for Respondent.

THE COURT.—The defendant is a physician and surgeon, and as such he examined the plaintiff Hannah M. Baily, and pronounced her ailment to be a cystic tumor of the ovary, and ordered her to a hospital, where he proceeded to operate upon her for the said ailment. After an abdominal incision and careful inspection of the parts, he discovered that the ovaries were in reasonably good condition, and, finding the uterus enlarged, concluded that the patient was probably pregnant, and sewed up the incision. The wound healed, and subsequent events proved that she was not pregnant at the time of the attempted operation. Thereafter the physicians and surgeons called as witnesses reached the conclusion, from the history of the case and all the circumstances surrounding it, that the patient's trouble was neither pregnancy nor an ovarium tumor, but was in fact a fibroid tumor of the uterus or something else nearly allied thereto. The patient and her husband brought this suit to recover forty thousand dollars for the said alleged unskillful and negligent acts of defendant. The verdict and judgment being in defendant's favor, plaintiffs moved for a new trial, and bring this appeal from the order denying the motion.

1. Respondent makes the preliminary objection that the proposed statement on motion for new trial was not served in time, and therefore the court was warranted in denying the motion, because there was no proper record to base it on. But it appears that appellants made a motion in due form to be relieved from their failure to serve the statement in time upon the ground of excusable neglect. This motion was granted, and thereafter the statement was duly settled and certified by the court. It was clearly within the discretion of the court to do this. (*Banta v. Siller*, 121 Cal. 414.) In view of the trial court's order relieving appellants from their failure to serve the statement in time, we will not presume that the new trial was refused on the ground of any delay in the service of the proposed statement.

2. Many objections are urged by appellant, but we will discuss only those errors which seem to require a reversal of the order appealed from.

On the trial medical witness called by defendant as experts to prove that his treatment of Mrs. Baily was neither negligent nor lacking in medical or surgical skill were allowed, in response to questions by defendant's counsel and against the objections of plaintiffs that the same was incompetent and hearsay, to recite instances from medical reports and authors illustrating the difficulties which attend a diagnosis under the circumstances developed in the case of Mrs. Baily. For instance, Dr. De Vecchi was permitted to say: "I refer to some reports in the *Annals of Medicine*, which prove the difficulty of making a diagnosis. . . . Professor Reverding, of Geneva, who is considered one of the most eminent surgeons of Geneva, once examined a woman; he could not make a diagnosis, but he suspected pregnancy, which diagnosis he doubted after the absolute assertion of the woman that it was impossible that she should be pregnant. He sent the woman to a hospital in Geneva, where the physician, after a careful examination and questioning of the woman, decided to wait for a while, under suspicion of pregnancy, and after a month or two an abdominal opening was made, and they found a pregnant uterus of six months."

Another physician testified: "I think you will find it in a book. Spencer Wells, when asked what class of tumor he was dealing with in an operation he was about to perform, said: 'I have stopped guessing; I will tell you when I open the abdomen.' That was after he had performed one thousand operations. He was the greatest author on abdominal tumors." There were many more of these illustrations and recitals from standard authors, living and dead, but the above quotations are sufficient to illustrate the point. It has been held, without conflict and in an extended line of cases in this state, that medical works are hearsay and inadmissible in evidence, except perhaps on cross-examination when a specific work may be referred to, it seems, to discredit a witness who has based his testimony upon it. (*People v. Wheeler*, 60 Cal. 581;¹ *Gallagher v. Market-Street Ry. Co.*, 67 Cal. 13;² *Lilly*

¹ 44 Am. Rep. 70.

² 56 Am. Rep. 713.

v. *Parkinson*, 91 Cal. 655.) In *People v. Goldenson*, 76 Cal., at page 348, it is said: "Dr. Wolsey, one of the experts called by the defense, was asked to name the circumstances of the cases he had read where violence accompanied hysterical mania, and the court sustained an objection to the question. If allowed, the examination would have been in effect the introduction of medical works in evidence, and therefore it was properly rejected." It must be taken as the settled rule in this state that medical books are not admissible as evidence, except in the instance already specified. If the books themselves are hearsay and inadmissible, certainly any recital of their contents or the substance thereof is none the less hearsay, and should be excluded for that reason. It is apparent that the plaintiff's case may have been materially prejudiced by the erroneous admission of this evidence.

3. At the request of respondent the court instructed the jury as follows: "The defendant in this action is not charged by the plaintiffs with any lack of general skill or competency as a physician and surgeon. This amounts to an admission, and you are bound to hold accordingly, that the defendant was possessed of that ordinary medical and surgical knowledge and skill which the law requires him to possess; there being no degree other than that of ordinary knowledge and skill recognized by law as a standard or applicable as a measure of knowledge and skill in such cases."

This instruction was erroneous, and should not have been given. The plaintiff charged the defendant with negligence and want of skill in treating her, and should have been left to argue to the jury that the facts presented showed that the defendant was lacking in the skill usually possessed by a physician and surgeon.

The order appealed from is reversed.

[Crim. No. 1038. In Bank.—January 6, 1904.]

In re LEO J. CHRISTAL, on Habeas Corpus.

CUSTODY OF MINOR—VOLUNTARY DEPARTURE FROM STATE—HEARING ON HABEAS CORPUS—GOOD FAITH OF RESPONDENTS.—Where the return to a writ of *habeas corpus* sued out by a father to obtain the custody of his minor son showed that he had of his own volition departed for Honolulu, and there remained with his sister, and where upon the hearing it appeared that the minor was a son fifteen years of age and in size a man, and that he had quarreled with his father, and had determined never to return to him, and that respondents did not encourage him to go to Honolulu, but merely from motives of humanity furnished him with funds for the trip which he determined to take, and that this was not done to evade the writ or to deprive the father of his custody or for any ulterior or sinister motive or purpose, and that the child is not in their control, the writ of *habeas corpus* must be discharged.

HEARING in the Supreme Court upon Writ of Habeas Corpus directed to R. F. Johnson and Teresa Johnson, of Monterey.

The facts are stated in the opinion of the court.

William T. Kearney, for Petitioner.

C. F. Lacey, and W. W. Foote, for Respondents.

SHAW, J.—This is an application by J. F. Christal, father of Leo J. Christal, for a writ of *habeas corpus*, to compel the respondents R. F. Johnson, and his wife, Teresa Johnson, the aunt of Leo J. Christal, to produce the body of said Leo J. Christal. The petition was filed on the twenty-eighth day of May, 1903. Respondents make return that said Leo J. Christal, on about the seventh day of May, 1903, of his own volition, went to Honolulu, and there remains, living with his sister, Anita Christal, and that he is not within their custody or control.

Upon the hearing the respondent R. F. Johnson was cross-examined with reference to the facts stated in the return. Thereupon it appeared that the boy, being fifteen years of age, in February last resided in Santa Cruz with his father; that at that time he voluntarily left his home, owing to some

quarrel with his father, and went to the residence of the respondents in Monterey County, and there remained with them until May 6th, not at their solicitation or procurement, but of his own free will; that he declared that he would never return to his father, but would rather throw himself into the bay, or become a tramp; that his sister, who is now in Honolulu, wrote to him to come to her to reside, whereupon he declared his intention of going; that upon his so declaring his intention and making preparations to go, he, having no money wherewith to pay his passage, the respondent R. F. Johnson, who had in his control money belonging to the boy, arranged to have his passage paid, and to that extent assisted in his departure; but that he did not advise or counsel or encourage him to go. Respondent strenuously denies that this was done in anticipation of the issuance of any writ, or that he had any wish or desire to prevent the boy from returning to the custody of his father, and there is no evidence to the contrary sufficient to satisfy the court that his statements are not true.

Counsel for the petitioner cite authorities to the effect that where a child has been given by the parent into the custody of a third person, or where it has been taken into custody by a third person against the wish of the parent, or through some design to take it from the parent's custody, and afterwards, upon a demand by the parent for its production, it appears that the parties so having the custody or control of the child, in anticipation of the issuance of a writ of *habeas corpus*, with the purpose of depriving the parent of its custody, have caused it to be taken beyond the jurisdiction of the court, the fact that it is at the time of the hearing beyond the control of the respondent is no answer to the writ. The court under such circumstances, if it has any reasonable ground to believe that the respondent can produce the child, will imprison him until the child is produced, or until it is demonstrated that its production by the respondent is impossible. These authorities have no application to this case. Here the child is fifteen years of age, and in size is a man. So far as the evidence shows, he has not been detained from the father by the respondents, and he was not sent to Honolulu in anticipation of any writ, nor for the purpose of depriving the father of his custody. He went of his own volition, and all that the respondents did was, from motives of humanity, to furnish

him sufficient funds for his comfort on the trip. It appears that this was not done for any ulterior or sinister motive or purpose; and further, that the child is not now under the control of the respondents.

We are therefore of the opinion that the respondents must be discharged and the writ dismissed.

Van Dyke, J., McFarland, J., Henshaw, J., Lorigan, J., and Angellotti, J., concurred.

[Sac. No. 1102. In Bank.—January 6, 1904.]

REBECCA HOFASAS et al., Respondents, v. WILLIAM CUMMINGS, and LEWIS B. CUMMINGS, Appellants.

TRUST—VOID TRUST TO CONVEY.—A deed of trust to a son of the trustor, providing for a deed by him to another son of all of the residue of the real property remaining five years after the death of the trustor, and providing that no property or the proceeds thereof shall vest in such other son until the expiration of such period, and until a transfer and delivery thereof to him at the expiration thereof, creates a void trust to convey, under the authority of *Estate of Fair*, 132 Cal. 523.¹

ID.—VOID TRUSTS OVER.—Trusts over, to the effect that in the event that the beneficiary named shall die before the expiration of the period fixed, without a testamentary disposition by him provided for in the trust, the property shall then vest in the trustee named or his surviving children, though not void *per se*, are absolutely dependent upon the void trust, and cannot be separated therefrom, and must fall with it. [Beatty, C. J., Shaw, J., and Angellotti, J., dissenting.]

APPEAL from a judgment of the Superior Court of Sacramento County. J. W. Hughes, Judge.

The facts are stated in the opinion of the court.

White & Miller, for Appellants.

The trusts are severable, and William Cummings is entitled to hold the property until the term of the second trust

¹ 84 Am. St. Rep. 70.

has expired. This action at law is not maintainable till the trust is terminated. (Perry on Trusts, 5th ed., secs. 847, 917, 928; *Van Campe v. Searles*, 147 N. Y. 161; *Johnson v. Johnson*, 120 Mass. 465; *Harrigan v. Mowry*, 84 Cal. 456, 457; *McDonald v. McCoy*, 121 Cal. 71.)

Devlin & Devlin, for Respondents.

The valid and invalid trusts are so blended that they cannot be separated without doing violence to the intention of the testator, and the whole trust must fall. (*Estate of Fair*, 136 Cal. 79; *Carpenter v. Cook*, 132 Cal. 621;¹ *Benedict v. Webb*, 98 Cal. 460, 466; *Tilden v. Green*, 130 N. Y. 29.²)

HENSHAW, J.—This is an action to quiet title. Plaintiffs claim as grandchildren and heirs at law of Rebecca Cummings, deceased. The defendants are sons of Rebecca Cummings, and deraign title through a deed of trust executed by their mother. The action was commenced after the death of Rebecca Cummings, and was founded upon the view of the plaintiffs that the deed of trust was void. The trial court so held and refused its admission in evidence. From the judgment which followed in favor of plaintiffs the defendants appeal.

The deed of trust was a conveyance to the son, William Cummings, upon certain trusts, which need not here be specified, since they concern the disposition to be made of the property and its income during the life of the trustor, and were executed and terminated upon her death. The third and fourth clauses of the instrument are as follows:—

“3. At the date of my death, one half of said real property, or if at that time said real property has been sold under the authority herein conferred, by said party of the second part, then one half of the proceeds of such real property shall become the property of said party of the second part, and said one half of said property, or the said one half of the proceeds thereof shall be thence released from the trust herein created.

“4. The remainder of said real property, or the proceeds of the same, shall remain subject to the trust herein created, and

¹ 84 Am. St. Rep. 118.

² 27 Am. St. Rep. 487, and note.

the whole of the income thereof shall be paid to my said son, Lewis B. Cummings, by said party of the second part as soon and as often as the same shall be received by him; at the expiration of five years after my death said party of the second part shall make a deed of said remaining portion of said real property to my said son Lewis B. Cummings, if it is at that time composed of the hereinbefore described real property, or real property of any kind, and if the said hereinbefore described real property has at that time been sold under the authority hereof, then said party of the second part shall transfer to said Lewis B. Cummings the proceeds of the same in whatever form it may be and deliver the possession thereof to him, provided, however, that the title to said property shall not vest in said Lewis B. Cummings until such delivery is made to him in person;

“From the date of my death until said property vests in him as provided for herein said Lewis B. Cummings shall have the right to dispose of said property, and every part thereof, by will, and if at his death (providing he shall die within said period of time) he shall have failed to have disposed of said property by will, then the whole remaining portion of said property shall vest in said party of the second part and be freed from the trust herein created, and if at that time the said party of the second part be dead, the title to said last-described property shall vest in his children which are then surviving, and said word ‘children’ shall not be construed to include grandchildren, and the trustee then acting in the place of the said party of the second part shall convey the same to said children absolutely, and said property shall be freed from the trust herein created.”

The trial court took the view that the trust to Lewis B. Cummings could not be distinguished from the trust to convey, condemned and declared void in the *Estate of Fair*, 132 Cal. 523,¹ and in this construction we think the court was correct. It is declared as to Lewis B., that the trustees shall “make a deed” to him, and that the title to the property shall not vest in him except as thus provided. There appears to have been thus designedly created a trust to convey, a trust whereby the title to the property should vest, and could only

vest, in Lewis B. upon the execution of the deed, and, in fact, as we read appellants' brief, they declare that an examination of the situation of the parties to the instrument and the surrounding circumstances would show that, because of existing differences between Lewis B. Cummings and his wife, his mother "tried to place him in a position where his interest could not be sold under execution, or where the purchaser under such a sale could not demand of the trustee a conveyance as the successor of his title." But, apart, from these extraneous considerations, the instrument itself, as we have said, clearly manifests its intention, and *ex industria* creates a prohibited trust to Lewis B. Cummings.

The trusts over, in the event that Lewis B. should die failing to exercise the power of testamentary disposition, are not obnoxious to the same objection. It is provided by them that upon the contingency arising, the "property shall vest" and "the title shall vest in the other son, or in his surviving children, following which there is a provision that the trustee "shall convey the same to the children absolutely," and the trust shall terminate. The distinction between the trusts over and the trust to Lewis B. is broad and well defined. As to Lewis B., the property and its title cannot vest in him excepting by the conveyance. In the trusts over the title vests absolutely under the terms of the instrument, and the added provision that a conveyance shall be made amounts to nothing more than an assurance of title. In the trusts over, therefore, there are apt words granting and conveying title by the act of the trustor under the instrument itself, while in the case of Lewis B. the only title which he is to receive is from the trustee, and none whatever from the act of the trustor.

But while the trusts over, in the event of Lewis B. Cummings's death, are not obnoxious to our law governing express trusts, yet they are absolutely dependent upon the void trust to Lewis B., and must fall with it. Nor can it be said that the provisions of the other trust to William can be given effect without doing injustice to the intention of the trustor. The whole instrument, therefore, comes under the well-settled rule, that where valid and invalid provisions are so blended that it is impossible to separate them and give effect to the one without doing violence to the intention of the trustor, the

whole trust must fall. (*Carpenter v. Cook*, 132 Cal. 621; *Estate of Fair*, 136 Cal. 79.)

For the foregoing reasons the judgment appealed from is affirmed.

McFarland, J., Van Dyke, J., and Lorigan, J., concurred.

We dissent upon the ground that the case is distinguishable from the case of *Estate of Fair*, 136 Cal. 79.

Beatty, C. J., Shaw, J., Angellotti, J.

Rehearing denied.

[Crim. No. 993. In Bank.—January 7, 1904.]

THE PEOPLE, Respondent, v. FRANK CREEKS, Appellant.

CRIMINAL LAW—MURDER—CIRCUMSTANTIAL EVIDENCE—ERROR AS TO PREVIOUS DECLARATION OF WITNESS—PRIOR TESTIMONY.—Where upon a trial for murder the testimony implicating the defendant was wholly circumstantial, and tracks leading to the place of killing corresponded with shoes found in defendant's room, and his mother, when called as a witness for the prosecution, said she could not tell positively what shoes her son had worn on the day of the killing, and that her testimony to the contrary at the preliminary examination was a mistake, it was prejudicial error to compel her to testify that at the coroner's inquest she testified that he wore those shoes during the whole day of the homicide.

ID.—SURPRISE—IMPEACHMENT OF ADVERSE WITNESS—MERE FAILURE OF EVIDENCE.—It is only where a witness who has been called by a party has given damaging testimony against him, by which he has been surprised, that he is permitted to show that the witness had made contradictory statements, by way of impeachment; but where a witness called by a party has simply failed to testify to all that was expected or desired, but has not given testimony against him, it is not permissible for the party calling him to prove that such witness previously made statements which if sworn to at the trial would tend to make out a case.

APPEAL from a judgment of the Superior Court of Tulare County and from an order denying a motion for a new trial. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

J. S. Clack, and D. M. Edwards, for Appellant.

U. S. Webb, Attorney-General, and E. B. Power, Deputy Attorney-General, for Respondent.

THE COURT.—The defendant was convicted of the crime of murder in the first degree, for the killing of one James N. Cornell, and adjudged to suffer death. He appeals from the judgment and from an order denying his motion for a new trial.

The deceased was found dead on his own land, under circumstances showing that he had been shot from behind with a shot-gun, and that whatever valuables he had on his person had been taken by the murderer. The evidence relied upon to connect the defendant with the killing was wholly circumstantial.

There was evidence tending to explain away many of the circumstances, and to create a doubt of the guilt of the defendant, but there were circumstances tending strongly to show guilt, and it cannot be held that the evidence was insufficient to sustain the verdict. Most important evidence, however, against the defendant was that relative to shoe-tracks leading to and from the place of the killing, which were apparently made by shoes similar to a pair found in defendant's room. It was all-important for the prosecution to show, if it could, that defendant wore those particular shoes on the afternoon of the killing. There is no direct evidence in the record showing that he did so wear them, except that afforded by the prior statements of defendant's mother that he did have on those shoes at the time he left her home, shortly before the killing. The mother was called as a witness by the prosecution, and having, in response to the questions of the district attorney, testified generally as to the movements of the defendant on the day of the homicide, said, "I could not tell you what shoes he had on when he went hunting. I cannot

swear positively what shoes he had on." In so testifying, she apparently did not come up to the expectations of the district attorney, who, on redirect examination, asked her if she did not, at the preliminary examination, testify that he had those shoes on his feet when he left home that afternoon. Without objection, she answered that she did say so at that time, and also said, "but it was a mistake; for I didn't notice them on his feet after dinner." She was subsequently recalled by the prosecution, and compelled over objection to testify that at the coroner's inquest she testified that he wore those shoes during the whole of the day of the homicide. She was further asked if her memory was not much fresher on that point at that time than on the trial, and answered that it was, but that she was sick at the time. The prosecution was further allowed to show by another witness who was at the coroner's inquest that the shoes concerning which the mother then testified were the shoes which corresponded with the tracks near the place of the homicide.

This testimony was the only direct evidence in the case tending to show that the defendant at the time of the homicide wore shoes that could have made those tracks. It is unnecessary to point out the prejudicial effect of the evidence as to these declarations, especially when we stop to consider that they came from the lips of one who would naturally seek to conceal everything that might be injurious to defendant's cause.

The evidence thus elicited over the objection was incompetent for any purpose. It was clearly not offered for the purpose of refreshing the memory of the witness, as was the case with an unimportant question in *People v. Durrant*, 116 Cal. 179, 213. Here the memory of the witness had been fully refreshed by the question as to her testimony in regard to the same matter given at the preliminary examination, when she had acknowledged the testimony and attempted to excuse it by stating that she was then mistaken. Her memory had been further refreshed on the trial by being allowed silently to read the transcript of her testimony given at the coroner's inquest, before being questioned as to the same. The testimony was sought to be elicited solely for the purpose of getting before the jury statements made by the mother on a prior occasion, tending to make out the case of the people. Where a witness

called by a party has simply failed to testify to all that party expected or desired, but has not given testimony *against* him, it is not permissible for the party calling him to prove that such witness had previously made statements which, if sworn to at the trial, would tend to make out his case. As was said by Mr. Justice McKinstry, in *People v. Jacobs*, 49 Cal. 384, "To admit the proof of such statement would enable the party to get the naked declaration of the witness before the jury as independent evidence." That such testimony is not authorized by the provisions of sections 2049 and 2052 of the Code of Civil Procedure was squarely held in *People v. De Witt*, 68 Cal. 584, 588. The decisions of this court uniformly hold such testimony objectionable. (See *People v. Jacobs*, 49 Cal. 384; *People v. De Witt*, 68 Cal. 584, 588; *People v. Wallace*, 89 Cal. 158, 164; *People v. Mitchell*, 94 Cal. 550, 566; *In re Kennedy*, 104 Cal. 429, 431; *People v. Conkling*, 111 Cal. 624; *People v. Crespi*, 115 Cal. 55.)

Upon this subject, this court has never gone further than to hold that where a witness called by a party has given damaging testimony against him—as, for instance, if the mother had here affirmatively testified that defendant did *not* wear the shoes when he left her home—the party calling him may show that the witness previously made statements inconsistent with his present testimony, and this ruling is apparently upon the theory that the party was surprised by the adverse testimony given by his own witness. Here, as was said in *People v. Mitchell*, 94 Cal. 550, 566, "The impeaching statements were evidently desired as evidence. If such testimony were admissible, it would be easy to manufacture evidence of that kind. If a witness merely fails to testify as expected, that does not authorize the party calling him to prove that the witness had elsewhere made the desired statements." (See, also, *People v. Conkling*, 111 Cal. 624.)

The prejudicial effect of this testimony was not obviated by the fact that the witness had without objection acknowledged the giving of such testimony before the committing magistrate. She had attempted to explain such discrepancy by stating that "it was a mistake, for she didn't notice them on his feet after dinner." It was not likely that she would make the same "mistake" in such a matter on two occasions, and the fact that she had also at the inquest, immediately

after the homicide, made this most damaging declaration against her son, must have operated with telling effect upon the jury. Because of the erroneous admission of this evidence, the judgment must be reversed. We are not disposed to regard seriously technical errors which could not have substantially affected the rights of a defendant, but where it is clear that an error must have injuriously affected his cause the judgment cannot be allowed to stand.

An examination of the record in this case indicates that there may be a serious question as to the correctness of some of the rulings of the trial court in excluding evidence offered by the defendant relative to the shoe-tracks. Upon this most important matter it is needless to suggest that the defendant is entitled to have admitted all legal evidence offered by him tending to contradict that offered by the prosecution.

The transcript in this case contains 822 pages and 2460 folios, many times more than the necessities of the case require. Something over one hundred rulings of the court are assigned as error, but most of these assignments are so trivial as not to be worthy of notice by any court. In the majority of cases designated as error appellant's counsel do not deign to specify in what particular the error consists, but simply state that the court erred in this, that it did so, etc.

The practice indulged in herein has unnecessarily increased the labors of this court, which is already overwhelmed with business. Because of the importance of the case, we have, however, thoroughly examined the transcript, and it is entirely due to such examination that the error necessitating a reversal has been brought to light, notwithstanding the obscurity caused by the unnecessarily voluminous record, and the assignment of so many trivial errors without cause.

The judgment and order are reversed and the cause remanded for a new trial.

VAN DYKE, J., dissenting.—I dissent. The evidence in this case shows that a cold-blooded and most atrocious murder was committed, and that robbery was the motive; and all the circumstances point to the defendant as the guilty party. The error referred to in the opinion of the court, and on which the case is reversed, in my opinion, did not affect the

substantial rights of the defendant, and it is the law: "After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties" (Pen. Code, sec. 1258); and, therefore, I am of the opinion that the judgment of the court below should be affirmed.

[S. F. No. 2372. Department One.—January 8, 1904.]

G. S. COHEN, Respondent, v. ROSE COHEN, Appellant.

CONTRACT FOR ANNUITY—CONSTRUCTION.—A contract whereby a son agreed to pay to his father a monthly sum during the period of the life of the father, and further to pay said sum to his sisters Rose and Esther, "or to their order, during the period they remain single or unmarried, and said payment is to cease as soon as both are married, but the payment as aforesaid is only to be made to said Rose and Esther in case the said Rose and Esther are unmarried after the death" of the father, should be construed as requiring the payment to be made to a sister who was unmarried at the father's death, so long as she continued unmarried, although the other sister, prior to the death of the father, became and ever since has been a married woman.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. M. C. Sloas, Judge.

The facts are stated in the opinion of the court.

Henry H. Davis, for Appellant.

Otto tum Suden, for Respondent.

ANGELLOTTI, J.—This action was brought for the purpose of determining an adverse claim made by defendant against plaintiff, based upon a written contract executed by plaintiff to his father, William Cohen. Judgment was given in favor of plaintiff, decreeing that plaintiff is not bound under said contract to pay to defendant any sum of money whatever, and enjoining defendant from making any claims

against plaintiff under said contract. Defendant appeals from said judgment, on the judgment-roll.

The findings of the court, upon which the judgment is based, show the following facts: The contract involved was entered into between plaintiff and his father on May 22, 1883, the consideration for the promise of plaintiff therein contained being the transfer to him by his father of a lot of personal property, stock, and the good-will of a business carried on by the father.

In consideration of such transfer, plaintiff agreed to pay to his father the sum of twenty-five dollars on the first day of each and every month thereafter, during the period of the natural life of the father, and further "to pay said sum of twenty-five dollars, as aforesaid, to his sisters Rose and Esther Cohen, or to their order during the period they remain single or unmarried, and said payment is to cease as soon as both are married, but the payment as aforesaid is only to be made to said Rose and Esther Cohen in case the said Rose and Esther Cohen are unmarried after the death or decease of said party of the second part." The father was the party of the second part. The defendant is the Rose Cohen mentioned in said agreement. Plaintiff made the payments stipulated to his father until the twenty-first day of September, 1899, when said father died, leaving him surviving the defendant, and also the said Esther Cohen. Prior to the death of her father said Esther Cohen became, and ever since has been, a married woman. The defendant, Rose Cohen, has never been a married woman. Esther Cohen makes no claim under said contract.

Certain allegations of the complaint as to a subsequent agreement for the cancellation and destruction of the agreement and as to a marriage of defendant are found to be untrue, and the judgment of the court in favor of plaintiff is entirely based upon the theory that, under the terms of the contract, the marriage of one of the sisters prior to the death of the father, terminated all liability of plaintiff thereunder, so far as the sisters are concerned. The material facts are fully found by the court, and the only question presented by this appeal is as to the proper construction of the written agreement in this respect.

While the agreement is not as clearly and concisely expressed in this behalf as it might have been, we are of the opinion that it sufficiently shows that it was the mutual intention of the parties thereto that the monthly payment of twenty-five dollars was to be continued after the death of the father, in the event that either of his two daughters was then unmarried, for the benefit of such unmarried daughter, and was to cease only when both had married. Taking the whole contract together in such a manner as to give effect to every part, such appears to be the only reasonable construction. The construction contended for by respondent is unreasonable in this, that while under such construction no payment is to be made to the unmarried sister if the other sister married prior to the death of the father, on the other hand, if neither sister married prior to such death, the payments to the sisters must commence at such death, and continue, despite the subsequent marriage of one, until *both* are married, for there can be no doubt, under the wording of the contract, unless the provision as to the time of cessation of payments be entirely disregarded, that once having commenced, they shall cease only when "both are married."

It is impossible to conceive of any object for such a distinction. It is likewise difficult to understand why the parties should agree that the unmarried sister should be deprived of the benefit of a payment intended for her support while she remained unmarried, simply because her sister, for whose support while unmarried it was also intended, became a married woman.

The provisions for the payment to the sisters were undoubtedly inserted with a well-understood object. The father was contracting for the benefit of his daughters, providing partially for their support after his death, so long as they did not, through marriage, acquire other means of support. This is clearly shown by the contract. The taking away of this support from one, because of the marriage of the other, is plainly inconsistent with this object. It further clearly appears, we think, that neither sister was to be a beneficiary under said contract after her marriage.

The contract between the parties was simply this, viz.: The son, in consideration of the transfer to him of his father's

property, assumed the obligation to support, to a specified extent, his father while he lived, and, after his father's death, his unmarried sisters, if any there then were, until they became married, when, according to the understanding of father and son, they would not need further aid. The amount stipulated was to be paid by the son, after his father's death, if the sisters survived, unless in the mean time both sisters had married, and no portion thereof was at any time to be paid to any married sister. So long as an unmarried sister remained, just so long must the payment to her continue.

This construction gives effect to every part of the contract, and effectuates what the contract clearly indicates was the mutual intention of the parties executing it. The last clause quoted above from the contract, to the effect that the payment is only to be made to the sisters "*in case they . . . are unmarried after the death*" of the father, and upon which respondent so strongly relies, is substantially the same in all material respects as the first clause quoted, where he agreed to pay the money "*to his sisters . . . during the period they remain . . . unmarried,*" which is followed by the provision that "*said payment is to cease as soon as both are married.*" This provision indicates most clearly that the parties did not intend that the marriage of one should cut off the other. The pronouns and conjunctions are the same in the last as in the first clause, and must be presumed to have been used to express the same meaning in both places. The time of cessation of the payments is clearly and definitely stated, in terms that cannot be misunderstood,—viz., "*as soon as both are married,*"—and the final clause was apparently inserted to make certain the proposition that no payment was to be made after the death of the father, in the event that both are married before such death.

Plaintiff was not entitled to any relief by this action.

Defendant, by cross-complaint, sought judgment for certain installments alleged to be due her under the contract, but the finding of the court in regard thereto being to the effect that there is not unpaid any sum of money thereon, precludes this court from directing that judgment be entered on said cross-complaint in favor of defendant.

The judgment is reversed and the cause remanded, with directions to the court below to enter judgment to the effect that

plaintiff take nothing by this action, and that defendant recover her costs.

Shaw, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[S. F. No. 3530. Department One.—January 9, 1904.]

In the Matter of the Estate of MARY ANN BRUNDAGE, Deceased. CHARLES S. BRUNDAGE, Appellant, v. UNION TRUST COMPANY, Administrator, etc., Respondent.

ESTATES OF DECEASED PERSONS—RIGHT OF ADMINISTRATION—ADVERSE CLAIM TO PROPERTY.—An adverse claim to property claimed by the estate of a deceased person is not a statutory disqualification of a resident son of the deceased otherwise competent to act as administrator of the estate with the will annexed, and such son is entitled to administer upon such estate as against the nominee of a non-resident executor and of non-resident children, heirs, and legatees of the deceased person.

ID.—POWER OF COURT—DISCRETION.—The court has no power to add to the statutory disqualifications of an administrator, and has no discretionary power to refuse letters of administration to one who has the statutory right thereto, or to appoint the nominee of persons not entitled to the letters applied for, as against the one entitled thereto.

ID.—PROBATE OF FOREIGN WILL—AUTHENTICATED COPY—RIGHT OF FOREIGN EXECUTOR—POWER OF NOMINATION.—Where the foreign will of a deceased person was admitted to probate in another state, and an authenticated copy thereof was admitted to probate in this state, the foreign executor, if he applies therefor, is entitled to letters testamentary in this state as against a resident son of the deceased testator, but if he makes no such application, he has no power or right to nominate an administrator with the will annexed, and the resident son has the better right to letters of such administration as against such nominee.

ID.—RIGHTS OF ASSIGNEE OF DEVISEE.—Though the assignee of a daughter of the deceased person, who is a devisee, is entitled to letters as against the public administrator, he is not entitled there-

to as against a son of the deceased testator, who is also a legatee named in the will, and in other respects competent to administer.

ID.—RIGHTS OF SON AGAINST DAUGHTER.—A son and daughter of a deceased person are not equally entitled to letters of administration, and the court has no discretion to do otherwise than appoint the son.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting letters of administration with the will annexed. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Goodfellow & Eells, for Appellant.

Beverly L. Hodghead, for Respondent.

ANGELLOTTI, J.—This is an appeal from an order granting letters of administration with the will annexed upon the estate of Mary Ann Brundage, deceased, to the Union Trust Company of San Francisco, and refusing to grant such letters to Charles S. Brundage.

The deceased was a resident of New York, and left property, real and personal, in this state. By her will, which was duly admitted to probate in the state of New York, she appointed one Schafmeister, a resident of that state, executor. Six children survived her, each of whom was a devisee and legatee under the will. One of these children was her son, Charles S. Brundage, the appellant here. He was a resident of this state and competent under our laws to act as administrator of her estate. None of the other children resided in California.

The appellant filed a duly authenticated copy of the will and the probate thereof in the superior court of the city and county of San Francisco, with a petition for its admission to probate here and the issuance to him of letters of administration with the will annexed. The respondent, Union Trust Company, a corporation authorized to act as administrator, also filed its petition praying that said will be admitted to probate, and that it be appointed administrator with the will annexed. Its claim was based upon the fact that it was the nominee of the non-resident executor, who had regularly re-

quested that it be appointed, and the nominee of non-resident children, heirs, and legatees of deceased, and also upon the fact that it was a party interested in the will, by reason of being the assignee of a portion of the legacy of Mary A. Hilliard, a daughter of deceased. It was also alleged and found to be a fact that appellant claimed an interest in certain real property adversely to the estate of deceased. The superior court admitted the will to probate, and ordered the issuance of letters of administration with the will annexed to the Union Trust Company, and denied the petition of Brundage.

It is admitted that the appellant was not disqualified by reason of his adverse claim to property claimed by the estate. (*Estate of Muersing*, 103 Cal. 585; *Estate of Bauquier*, 88 Cal. 302.) Our statute prescribes the grounds of disqualification, and the courts have no right to add to the disqualifications prescribed by the legislature. The fact of adverse claim is urged by the respondent solely as a justification of the exercise of the discretion of the superior court in favor of respondent, it being claimed that under the law the court was invested with the power to appoint either of the applicants; in other words, that the appointment was in the discretion of the court. The appellant claims that, under the circumstances of this case, he had the absolute right to letters of administration as against respondent, and that the court had no discretionary power whatever. This claim of appellant must, under the statutes and decisions, be sustained.

The sections relating to the probate of foreign wills (Code Civ. Proc., secs. 1322-1324) provide that when the copy of the will and the probate thereof are produced "by the executor, or by any other person interested in the will," a hearing shall be had upon notice, and that when so admitted to probate, "letters testamentary or of administration shall be issued thereon." (*Estate of Richardson* 120 Cal. 344, 345.) The non-resident executor could have made application for letters testamentary to himself, and would have been entitled to the same as against appellant. (*Estate of Brown*, 80 Cal. 381; *Estate of Richardson*, 120 Cal. 344.) He did not, however, apply for letters testamentary. The law applicable to such a case provides that if the executor fails to apply for

letters for himself, "letters of administration with the will annexed must be issued as designated and provided for the grant of letters in case of intestacy." (*Estate of Richardson*, 120 Cal. 344; *Estate of Coan*, 132 Cal. 401, 403.) In *Estate of Coan*, 132 Cal. 401, this court said: "The section just quoted from (sec. 1350, Code Civ. Proc.) is not restricted to any class of wills, and it certainly must include foreign wills in its provisions."

While the statute authorizes the issuance of letters *testamentary* to the non-resident executor, it does not entitle him to letters of *administration*, or give him the right to nominate an administrator with the will annexed. (*Estate of Beech*, 63 Cal. 458; *Estate of Richardson* 120 Cal. 344.) The case of *Estate of Harrison*, 135 Cal. 7, relied on by respondent, is not in conflict with this view, when we take into consideration the well-settled proposition that in the case of a foreign will, the public administrator is not "entitled" to letters of administration. (*In re Bergin*, 100 Cal. 376; *Estate of Engle*, 124 Cal. 292.) This rule is apparently based upon the fact that he is not "interested in the will." In *Estate of Harrison*, 135 Cal. 7, the contest was between the nominee of the foreign executor and the public administrator, neither of whom was interested in the will or "entitled" to letters, and the court undoubtedly had the discretionary power to appoint either, but such power was not derived from section 1379 of the Code of Civil Procedure. In the opinion in that case the court quotes with apparent approval the portion of the opinion in *Estate of Richardson*, 120 Cal. 344, to the effect that there is no provision in the statute giving the foreign executor the right to nominate an executor with the will annexed.

Section 1379 of the Code of Civil Procedure, which provides that administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, and which is relied upon by respondent as giving the court discretionary power in this case, has no application. This section has been considered by this court on numerous occasions, and it is well settled that the only effect thereof is to give the court the discretionary power to appoint as administrator a person not otherwise entitled, upon the written request of the person

"entitled." If the person making the written request is not himself "entitled" to administration, either because incompetent or because another applicant with a better claim is entitled, the nominee cannot be considered by the court. (*Estate of Beech*, 63 Cal. 458; *Estate of Bedell*, 97 Cal. 339, 341; *Estate of Muersing*, 103 Cal. 585; *Estate of Healy*, 122 Cal. 162, 165.) Here the non-resident executor was not, under the statute, entitled to letters of administration, and his written request was therefore ineffectual for any purpose. The non-resident children, heirs, and legatees were incompetent by reason of their non-residence, and consequently were not entitled to administration. Their request also was therefore ineffectual for any purpose.

It is, however, claimed that respondent, by reason of the assignment to it of a portion of the legacy of a daughter of deceased, was "interested in the will," and that the court had the discretionary power to grant letters of administration to it. It has been held that the assignee of a devisee is entitled, as a person interested in the will, to administration as against the public administrator. (*Estate of Engle*, 124 Cal. 292.) That the assignee of the legacy of a daughter is not entitled to letters of administration as against a son who is also a legatee and in other respects competent, is settled by the case of *Estate of Coan*, 132 Cal. 401, which is decisive of this question. In that case, the contest for letters of administration with the will annexed, upon a foreign will, was between a son and daughter, both of whom were legatees. The lower court granted letters to both, and the order was reversed by this court. This court there said: "The cases of intestacy referred to in said section 1350 are provided for in said sections 1365 et seq. It seems, therefore, beyond question that these sections apply to the probate of a foreign will, where, as in this case, the controversy as to who shall administer is between parties *interested in the will*." It was held that while the children of a deceased were, under section 1365 of the Code of Civil Procedure, apparently equally entitled, said section 1365 was qualified by section 1366 of the Code of Civil Procedure, which provides that "Of several persons claiming and equally entitled to administer, males must be preferred to females," and that therefore a son and a daughter are not equally entitled to administer, and the court had no discretion

to do otherwise than appoint the son. Waiving the question as to whether a corporation formed for the purpose, among others, of acting as executor or administrator is in any better position in a contest for letters, by reason of the fact that it has acquired by assignment an interest under the will, it certainly occupies no better position than its assignor. Its assignor, a daughter, would not have been entitled to letters of administration as against the appellant son, even if she were a resident of this state, and the superior court would have had no discretionary power to appoint her.

The appellant had the absolute right to letters of administration with the will annexed. The order directing the issuance of such letters to the Union Trust Company and denying the petition of Charles S. Brundage is reversed and the cause remanded.

Shaw, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[Crim. No. 979. Department One.—January 9, 1904.]

THE PEOPLE, Respondent, v. F. K. LEWIS, Appellant.

CRIMINAL LAW—TAKING AWAY OF FEMALE MINOR FOR PROSTITUTION—

VENUE OF OFFENSE.—If the original taking away of a female minor from the custody of her father in another county than that of the place of trial was with the intent then and there existing to place her in a house of prostitution in the county of the place of trial, the offense was committed and was triable alone in such other county; but where it appears that the female minor was placed by the father in the custody of the defendant, to be taken to the county of the place of trial for a lawful purpose, and that the defendant there formed the unlawful purpose of placing her in a house of prostitution therein, which purpose was accomplished, the taking of her away from the father without his consent for that purpose was in the county of the place of trial, within the meaning of section 267 of the Penal Code, and that county has jurisdiction of the offense.

12.—ELEMENTS OF OFFENSE—ABDUCTION—REFUSAL OF INSTRUCTION.—

The actual placing of the minor female in a house of prostitution is not made an essential element of the crime by the statute. It is the taking away from the parent or other person having the legal charge of the minor for the prohibited purpose that constitutes the crime; "abduction" alone does not import the offense; and a requested instruction, to the effect that if "the defendant abducted the girl from her home," the jury must find the defendant not guilty of the offense charged, was properly refused.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. Henry A. Melvin, Judge.

The facts are stated in the opinion of the court.

Charles S. Burnell, and William B. Craig, for Appellant.

U. S. Webb, Attorney-General, and E. B. Power, Deputy Attorney-General, for Respondent.

ANGELLOTTI, J.—The defendant was convicted in the superior court of the county of Alameda of the offense of taking away a female under the age of eighteen years from her father, without his consent, for the purpose of prostitution (see Pen. Code, sec. 267), and appeals from the judgment pronounced on such conviction and from an order denying his motion for a new trial.

The principal point made for reversal is as to the jurisdiction of the superior court of Alameda County. The information filed against defendant in said court alleged the commission of the offense in Alameda County, and it is claimed that the evidence shows that if the offense was committed by defendant, it was committed entirely in the county of San Benito, and that such evidence, therefore, fails to show any offense within the jurisdiction of the superior court of Alameda County.

The girl, who was sixteen years of age, lived at her father's home in San Benito County, and on October 16, 1901, left her father's home with the defendant and another female, and went with them to Oakland, by way of Gilroy and San Jose, at each of which places they remained for a few days. They arrived in Oakland, Alameda County, about October 23, 1901,

where they continued to live in a camp-wagon, in which they had traveled from San Benito County, until about the middle of November, 1901, when, as the evidence very clearly shows, the defendant placed the girl in a house of prostitution in said city of Oakland, for the purpose of profiting by her earnings therein. The testimony of the defendant himself in this connection was such that any rational jury could not come to a different conclusion.

There was evidence sufficient to warrant the jury in concluding that the father, who was without means and had a large family, allowed the defendant to take his daughter, upon the understanding that if she suited the niece of defendant's wife, who, he said, was then in Gilroy, she would take her to Oakland and give her a trade, and that the father never consented to her being placed in a house of prostitution. The father testified that defendant said: "Well, I guess she will send her to school and send her to learn the millinery trade." The defendant himself testified: "I took the girl . . . from her home at San Juan by consent of her father, to better her condition; there was nothing specially spoken of in what way I should put this girl; whether in a family; a private family was spoken of; there was millinery spoken of."

It must be conceded, as claimed by defendant, that the offense defined by section 267 of the Penal Code is complete when there is a taking for the purpose of prostitution. The section provides that "Every person who takes away any female under the age of eighteen years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable," etc. The actual placing in a house of prostitution is not made an essential element of the crime by the statute. It is the taking from the parent or other person having the legal charge of her person, *for the prohibited purpose*, that constitutes this crime. As said in *State v. Gibson*, 111 Mo. 92, of a similar statute: "The *gravamen* of the offense is the purpose or intent with which the enticing and abduction is done, and the offense is complete whenever the abduction for the prohibited purpose is complete, no matter whether any sexual intercourse result or not." (See, also,

People v. Dolan, 96 Cal. 315; *State v. Bobbst*, 131 Mo. 338; *Henderson v. People*, 124 Ill. 614;¹ *State v. Johnson*, 115 Mo. 495.)

Therefore, if the evidence was such as to compel the conclusion that the defendant took the girl from her father in San Benito County, with the intent then and there existing to use her for purposes of prostitution, we would be compelled to hold that the offense was wholly committed in San Benito County, and that no offense within the jurisdiction of the superior court of Alameda County was shown, unless such jurisdiction was conferred by section 784 of the Penal Code.

The evidence was, however, such as to sustain a finding of the jury to the effect that at the time the girl was given into the charge of defendant by her father there was no intent on defendant's part to use her for purposes of prostitution, and that such intent was not conceived by him until some time after their arrival in Alameda County while the girl was still in his actual charge, committed thereto by the father for a proper purpose, and that thereupon the defendant, in said Alameda County, placed her in a house of prostitution. Under these circumstances, it must be held in support of the verdict, that the taking of the girl from the father "for the purpose of prostitution" was in Alameda County, and not in San Benito County.

As was said by the supreme court of Missouri of a similar statute, "The statute does not require, in order to establish the crime, that the female should be taken from the house or premises of the person having legal charge of her person, from the actual possession of such guardian, but only that she be taken away from such person for the purpose named in the statute." (*State v. Round*, 82 Mo. 679.) In that case it was held that a father residing in the state of Missouri had the care and custody of a daughter at the time of the taking, although she was then visiting her uncle in the state of Iowa.

In the case of *State v. Gordon*, 46 N. J. L. 432, where the defendant had brought a girl into the state of New Jersey from another state, and there persuaded her not to return to her home, and seduced her, it was held, under a statute similar to ours, so far as the provision concerning the taking

¹ 7 Am. St. Rep. 391.

is concerned, that the girl, although in the state of New Jersey, was still in the custody and are of her legal guardian within the meaning of the statute, and that when "the defendant, with the intent set out in the statute, interposed his will or persuasion between her and her guardian's control," he accomplished the abduction in the state of New Jersey.

The decisions constitute full and complete authority for the proposition that, within the contemplation of the statute, a girl may be in the custody of the person having legal charge of her person, although absent from him with his consent, in the care of another for some proper purpose; and that one who then takes her for the prohibited purpose, takes her "from" the person having such legal charge of her person.

When the defendant, to whom this girl had been temporarily committed for a proper purpose, conceived the intent to use her for another purpose, one prohibited by this statute, and "interposed his will between her and her guardian's control," he took her from her father for that purpose. This was done, according to the finding of the jury, in Alameda County, and the crime was therefore wholly committed in that county. This being our view of the law, it is unnecessary to consider the question as to the application of section 784 of the Penal Code to a case of this character.

We have examined the rulings of the court relating to the admission of evidence, complained of by counsel for defendant, and find no prejudicial error.

The defendant assigns as error the refusal of the court to instruct the jury as follows, viz.: "If you find that the defendant abducted the girl from her home in San Juan, San Benito County, then you must find the defendant not guilty, as he has not committed the offense with which he is charged—in abducting a girl for the purpose of prostitution in Alameda County." The instruction was properly refused. The word "abduct" does not necessarily mean a taking for purposes of prostitution. According to this instruction, if the defendant had taken the girl from her home in San Benito County for a proper purpose, and without any intent to use her for the prohibited purpose, he could not subsequently take her from her father for such prohibited purpose, within

the meaning of section 267 of the Penal Code. As we have seen, this is not the law.

We are satisfied that no error substantially affecting defendant's rights has been shown, and that he has been properly convicted of a most despicable offense.

The judgment and order are affirmed.

Shaw, J., and Van Dyke, J., concur.

[Crim. No. 858. In Bank.—January 11, 1904.]

THE PEOPLE, Respondent, v. LEW FOOK, Appellant.

CRIMINAL LAW—INSTRUCTION—"MORAL CERTAINTY."—An instruction upon a charge of murder, that "moral certainty is described as a state of impression produced by facts in which a reasonable mind feels a sort of coercion to act in accordance with it," and that "it is also declared to be a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it," is not prejudicial to the defendant because amplifying the definition of "moral certainty" beyond section 1835 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

Henry C. Dibble & Dibble, for Appellant.

Tirey L. Ford, Attorney-General. A. A. Moore, Jr., Deputy Attorney-General, for Respondent.

HENSHAW, J.—The defendant was convicted of murder, and upon this appeal presents the single proposition of alleged error contained in one of the instructions given by the trial court.

That instruction is as follows: "'Moral certainty' is that degree of proof which the law requires of moral evidence. Moral certainty is described as a state of impression produced by facts in which a reasonable mind feels a sort of coercion

or necessity to act in accordance with it. It is also declared to be a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it."

The last sentence of the instruction is a quotation from the famous charge of Chief Justice Shaw in the *Webster case*, and has been uniformly if not universally approved. Appellant's attack, however, is directed to the preceding part of the instruction, and it is said that this language was inaccurate and injurious to the appellant in that it permitted the jury to be governed by their "impressions," and not by their "convictions." In this connection it is pointed out that section 1826 of the Code of Civil Procedure itself defines moral certainty as being "that degree of proof which produces conviction in an unprejudiced mind," and that elsewhere the code declares "That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind." (Code Civ. Proc., sec. 1835.)

We think, however, that no defendant can present any just reason for objecting to this amplification of the definition of moral certainty, since that amplification makes so clearly in his favor. The jury were here instructed as to the nature of the conviction which satisfies the reason and judgment of those who are bound to act conscientiously upon it, and were told that it was a conviction which impelled them by necessity or coercion to act upon it, or otherwise they entertained a reasonable doubt, of which the defendant must be given the benefit. "Impression," as here employed, does not vary essentially in meaning from conviction. "Impression" itself is a stamping in upon the mind. The language objected to is taken from *Burrill on Circumstantial Evidence* (p. 199), and that careful author fully justifies the language both by reason and authority.

The judgment appealed from is affirmed.

Angellotti, J., Shaw, J., Lorigan, J., and Van Dyke, J., concurred.

McFARLAND, J., concurring.—I concur in the judgment because the instruction complained of could have done appellant no injury; but I think that it should not have been given.

As shown in the opinion in *People v. Huntington*, 138 Cal. 261, the instruction includes only a part of a sentence in Burrill,—omitting the part which makes his meaning clear.

BEATTY, C. J., concurring.—I concur in the judgment on the ground stated by Justice McFarland, and I agree with him that the language quoted from Burrill should have been omitted from the instruction. It adds nothing either of force or clearness to the oft-approved definition of moral certainty given by Chief Justice Shaw in the Webster case, and I deprecate the disposition to expand and vary approved instructions in criminal cases, the only effect of which is to raise new questions and furnish new grounds for appeals.

[Crim. No. 900. In Bank.—January 11, 1904.]

THE PEOPLE, Respondent, v. CHEW LAN ONG, Appellant.

CRIMINAL LAW—PLEA OF GUILTY—DETERMINATION OF DEGREE BY THE COURT—CONSTITUTIONAL LAW—TRIAL.—Section 1192 of the Penal Code, conferring upon the court the power to determine the degree of a crime upon a plea of guilty, is not unconstitutional as being violative of the provisions of the state and federal constitutions for the right of trial of all crimes by jury. The proceeding for such determination is not a trial.

ID.—POWER OF COURT TO TAKE EVIDENCE.—The court being vested with the power to determine the degree of the crime, it has implied power under section 187 of the Code of Civil Procedure to take evidence to aid in such determination; and it is not a tenable objection to section 1192 of the Penal Code that it does not provide any mode by which the court is to reach the determination, nor provide for the taking of evidence on the subject.

ID.—MURDER—JUDGMENT OF DEATH—WARRANT—DIRECTION TO WARDEN—SURPLUSAGE—DUTY OF WARDEN.—The fact that a warrant issued to the sheriff for the execution of a defendant who has pleaded guilty of murder, and has been determined by the court to be guilty of murder in the first degree, in addition to the other provisions required to be inserted in the warrant, unnecessarily inserted a direction to the warden of the state's prison to execute

the defendant, does not vitiate it. Such direction may be disregarded as surplusage. It is the duty of the warden to execute the judgment of death under the law, independent of the order of the court.

ID.—WARRANT FUNCTUS OFFICIO—ORDER TO WARDEN.—A warrant of death becomes *functus officio* after the lapse of the time within which it directed the defendant to be executed; and an order must then be made under section 1227 of the Penal Code, after the defendant is brought before the court, expressly requiring the warden to execute the judgment at a specified time.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Carroll Cook, Judge.

The facts are stated in the opinion of the court.

H. H. McCloskey, and Barnes & Farquar, for Appellant.

Tirey L. Ford, Attorney-General, and A. A. Moore, Jr., Deputy Attorney-General, for Respondent.

LORIGAN, J.—An information was filed against the defendant in the superior court of the city and county of San Francisco, charging him with the crime of murder.

Upon arraignment he pleaded "Not guilty," but subsequently withdrew this plea and entered one of "Guilty."

When this latter plea was received by the court, it was conceded by the attorney for the defendant, that the duty devolved upon the court of determining, and fixing, under section 1192 of the Penal Code, the degree of crime, before passing sentence, and it was stipulated that the testimony taken at the preliminary examination of the defendant be introduced in evidence and used by the court for that purpose.

Thereafter, on March 10, 1902, the court determined from such evidence, that the crime was murder of the first degree, and adjudged that the defendant suffer the penalty of death, and on March 12, 1902, the judge of said court signed and issued a warrant of execution, directing the warden of the state prison, at San Quentin, to execute the judgment of death against said defendant on the sixth day of June, 1902.

The defendant appeals from said judgment and the order of execution, and contends,—1. That the court had no au-

thority to determine the degree of the crime; and 2. That the judgment and order of execution are void, because the court had no power to direct the warden of the state prison to execute the defendant.

In their briefs, counsel for appellant, upon the first point urge, that the power attempted to be conferred on the court by said section 1192, to determine the degree of crime upon the plea of guilty before passing sentence, is violative of that provision of both the state and federal constitutions providing that the trial of all crimes shall be by jury.

This is no new point. The same contention was made in this court forty years ago, and decided adversely to appellant's claim.

In *People v. Noll*, 20 Cal. 164, this court said: "The proceeding to determine the degree of the crime of murder after a plea of guilty is not a trial. No issue was joined upon which there could be a trial. There is no provision of the constitution which prevents a defendant from pleading guilty (to the indictment) instead of having a trial by jury. If he elects to plead guilty to the indictment, the provision of the statute for determining the degree of the guilt, for the purpose of fixing the punishment, does not deprive him of any right of trial by jury."

People v. Lennox, 67 Cal. 115, is to the same effect, and in *Hallinger v. Davis*, 146 U. S. 314, the supreme court of the United States declare that a statutory provision conferring power on the court under such a plea, to determine the degree of crime violates no provision of the constitution of the United States.

On the oral argument counsel made an additional point not presented in their brief, that this section is unconstitutional, because it does not provide any manner, or mode, whereby the court is to reach its determination as to the degree of crime; that it does not provide for the taking of evidence on the subject.

Jurisdiction to determine the matter is, however, expressly conferred on the court by the section. This means that there shall be a judicial determination, and where power is especially conferred upon a court of general jurisdiction to determine a particular question, and no special mode for that

determination is pointed out, the jurisdiction conferred necessarily implies authority in such court to call to its assistance in determining the particular question, the same aid as is usually employed by it in reaching a judicial determination in other cases.

The universal aid is evidence. This was the means employed by the lower court in determining the degree of crime in the case at bar. It is the only means by which a judicial determination can be had, and was the means which it was contemplated by the legislature should be invoked by the court.

If there could be any doubt of this general rule, we are satisfied that the course pursued by the lower court is provided for and sanctioned by section 187 of the Code of Civil Procedure, which declares that "When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

The method adopted by the lower court was entirely conformable to that spirit which provides for a judgment upon a conviction or plea of guilty of crime. If appellant's contention could prevail, a plea of guilty, generally, in those cases where the crime is divided into degrees—murder, burglary, arson—would be tantamount to immunity from punishment, because, as the determination of the degree of crime by the court is an essential prerequisite to the imposition of sentence, if the court is powerless to determine that degree, it is equally powerless to impose sentence, and hence, being unable to hold the defendant for any legal purpose, would be required to discharge him. This situation itself illustrates the wisdom of the general code provision, and the necessity for its application.

Under the second point appellant insists that the judge of the lower court had no power to insert in the warrant of execution a direction to the warden of the state prison to execute the defendant. Such a direction, however, would not

render the order void. The law provides that the judge in such warrant shall designate the date of execution, and require the sheriff to deliver the defendant to the warden for execution. (Pen. Code, sec. 1217.) The fact that the warrant in addition directed the warden to execute the judgment of death is of no moment, as this was a duty devolving upon the warden under the law, independent of the order of court. The order to that extent was surplusage. We are mindful of counsel's contention that there is no provision of law directing the warden to execute a judgment of death, but hardly think the contention worthy of serious consideration. The provisions of the Penal Code (secs. 1224, 1226, 1227) designate him as the official who must execute such judgment.

But, assuming that such direction to the warden in the warrant of execution was error, it could not now be available to the defendant for a reversal. From lapse of time the order has become *functus officio*, in as far as it directed the execution of the defendant. He was directed to be executed on June 6, 1902. That time having elapsed, another order of execution must be made, under which the point urged now cannot arise, because, by section 1227 of the Penal Code, the defendant must be brought before the court, and an order made which shall expressly require the warden to execute the judgment at a specified time.

We perceive no reason why the judgment and order should be disturbed, and they are affirmed.

McFarland, J., Shaw, J., Angellotti, J., Van Dyke, J., Henshaw, J., and Beatty, C. J., concurred.

[S. F. No. 2590. In Bank.—January 11, 1904.]

JOHN LACRABERE, Respondent, v. JOHN H. WISE et al., Appellants.

UNLAWFUL DETAINER BY LESSEE—NOTICE OF DEMAND FOR RENT OR POSSESSION—SERVICE—PLEADING AND PROOF—AFFIDAVITS—NONSUIT.—In an action of unlawful detainer by a lessee after non-payment of rent, under section 1161 of the Code of Civil Procedure, the service of a three days' notice to make such payment or deliver posses-

sion of the premises is a condition precedent to the right to commence the proceeding. It is necessary to aver the service of such notice in the complaint, and if put in issue it must be proved by competent evidence like any other fact in the case. It cannot be proved by affidavits, which rank as hearsay evidence, for the purposes of the trial of issuable facts. If only affidavits of the service were produced, without other evidence, a nonsuit should have been granted.

APPEAL from an order of the Superior Court of Santa Cruz County denying a new trial. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Frank J. Murphy, and Fred H. Hood, for Appellants.

George P. Burke, for Respondent.

LORIGAN, J.—This is an appeal by defendants from an order denying their motion for a new trial.

The action is for unlawful detainer, and the points made by appellants here are, that the evidence was insufficient to sustain any of the findings, and that the court erred in denying their motion for a nonsuit.

The complaint was in the form usual in such actions, alleging lease of the premises in controversy to defendants at a specified monthly rental, a failure to make payment of the rents for several months, the service of a three days' notice to make such payment, or deliver possession of the premises, and the failure of defendants to do either.

The answer puts squarely in issue every allegation in the complaint.

Upon the trial, counsel for plaintiff, to prove the allegation in the complaint of service of three days' notice, offered in evidence a paper purporting to be such notice, having attached to it affidavits of several persons tending to show service by them, upon the defendants, of the proffered paper.

Over the objection, and under the exception of defendants, this notice, with the accompanying affidavits as sufficient proof thereof, was admitted in evidence. This was all the evidence offered to prove such service.

At the close of plaintiff's case, defendant moved for a nonsuit, urging, among other grounds therefor, specially the one

that there was no proof of service of such notice. The motion was denied.

We are satisfied it should have been granted. It is an essential prerequisite to the maintenance of an action for unlawful detainer, under section 1161 of the Code of Civil Procedure, that a three days' notice, demanding payment of the rent due, or possession of the leased premises, should be served upon the defendants, as subdivision 2 of that section requires. It is equally essential to allege the service of such demand in the complaint, and, if controverted, prove it on the trial. Service is an act to be performed before suit, a fact to be alleged in bringing suit, and a fact to be proven to successfully maintain it, and such fact is to be proven as any other disputed fact in the case. The rule is, that the best evidence must be produced which the nature of the transaction will permit; the testimony of witnesses given in open court where the adverse party may have an opportunity of cross-examination. Affidavits are not in the nature of the best evidence by which to prove issuable facts. They rank on no higher plane for that purpose than hearsay evidence.

Counsel for respondent relies solely upon the construction he places on section 2009 of the Code of Civil Procedure to support the method of proof adopted by him.

That section provides that "An affidavit may be used . . . to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings," etc. And he insists therefrom that, as an action for unlawful detainer is a special proceeding, and the notice in question is one pertaining to a special proceeding, that service of the notice, on the hearing of such proceeding, could be proven by affidavit under the section.

But this section has no application to the proof of facts which are directly in controversy in an action. It was not intended to have the effect of changing the general rules of evidence by substituting voluntary *ex parte* affidavits for the testimony of witnesses. The section only applies to matters of procedure,—matters collateral, ancillary, or incidental to an action or proceeding,—and has no relation to proof of facts the existence of which are made issues in the case, and

which it is necessary to establish to sustain a cause of action. It might with the same plausibility be argued that, in those cases where it is essential that a demand should be made before an action for claim and delivery can be maintained, that proof of service of such demand could be made by affidavit, or that in any action—because the section applies to actions as well as special proceedings—where issue is joined as to service of a notice, or demand, or other “paper” proof could be made of the fact by affidavit. Aside from this, however, the service of the notice, sought to be proven by affidavit in this case, was not service of a “summons, notice, or other paper in an action or special proceeding.” An action, or special proceeding, referred to in the section, means a cause already commenced and pending in court, and it is to proof of service of notices and papers, incidentally used in such pending cause, that the section relates; notices or papers served upon the opposite party, or his attorney, under the general rules of procedure, and relating to the pending action or proceeding.

Nor was the notice served on the defendants to pay the rent or surrender possession, a notice given in any special proceeding. It was a notice given *before* any special proceeding was commenced; it antedated it. The giving of it was a condition precedent to the right to commence such proceeding at all, and proper proof of it was necessary to warrant recovery, and that proof should have been made by the testimony of the persons who made the service, taken at the trial, and not by their affidavits.

The same point is presented under a specification that the evidence is insufficient to support a finding of the court that such notice was given, and this must also be sustained.

For the reasons given, the order denying the motion for a new trial is reversed, and the cause remanded.

McFarland, J., Shaw, J., Angellotti, J., Henshaw, J., and Beatty, C. J., concurred.

[SAC. No. 1157. In Bank.—January 11, 1904.]

**WILLIAM SWEENEY, Respondent, v. GEORGE L. ADAMS,
Appellant.**

ELECTION CONTEST—DECLARATION OF ELECTION—FAILURE TO QUALIFY.—

No other right is involved in a contest of "the right of a person declared elected to any office" than the apparent legal right which is created by the declaration of the canvassing board that such person has been elected. The contest attacks the election itself, and is not concerned with the certificate of election or the proceedings subsequent thereto; and the jurisdiction of the court to entertain, or the right of the elector to commence, the contest, is not in any manner affected by the failure of the person declared elected to qualify before the contest was begun.

ID.—INTEREST OF PUBLIC.—The contest does not merely concern the personal and pecuniary interest of rival candidates for the office; but paramount to their claims is the deep public concern involved as to who are entitled to hold an office for which the suffrages of the electors have been cast. The public interests imperatively require that the ultimate determination of the contest should in every instance, if possible, reach the very right of the case, and ascertain and declare whether either of the rival candidates before the court or some other candidate has been elected.

APPEAL from a judgment of the Superior Court of Tuolumne County. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

F. W. Street, for Appellant.

J. P. O'Brien, for Respondent.

LORIGAN, J.—This is an election contest. The parties to this proceeding were rival candidates for the office of sheriff of Tuolumne County, at the last general election.

The board of supervisors, sitting as a canvassing board, declared the appellant elected to such office, and a certificate of election was duly issued to him.

Respondent, in due time, commenced a contest on the ground of malconduct on the part of the board of judges of election in counting the votes. Issue was joined, the cause tried, and the court found the charge of malconduct to be

true and that the respondent had received the highest number of legal votes cast for such office. A judgment was entered accordingly, annulling the certificate of election issued to appellant, and declaring the respondent elected to such office.

On this appeal no question is made by appellant as to the sufficiency of the evidence to sustain the findings.

His principal point is, that the lower court had no jurisdiction to hear or determine the contest, and should have granted his motion to dismiss it, and this point is based upon certain facts which the lower court found to be true, and which are not contradicted. These are that, after appellant had been declared elected to the office of sheriff by the board of supervisors acting as a canvassing board, and the proper certificate of election had been issued to him by the county clerk, he inadvertently failed to file his official oath and bond as such sheriff within the time required by law; that such oath and bond had not been filed when the contest was commenced or thereafter, and that the office had become vacant.

To fully appreciate the claim made by appellant from these facts, it is necessary to set forth the section of the code authorizing an election contest, for it is upon his construction of the section that his point is based.

It reads: "Any elector of a county . . . may contest the right of any person declared elected to an office to be exercised therein, for any of the following causes." (Code Civ. Proc., sec. 1111.)

Appellant insists, that the proper construction of this section is, that it provides only for a contest where the right to an office exists at the time the contest is begun; that the right to office which is contemplated, is the right which has been made perfect by taking all the legal steps necessary to authorize him to enter upon the discharge of his official duties when the term of office commences.

And from this construction he argues that, notwithstanding the appellant was declared elected by the canvassing board, yet, as he failed to qualify, he thereby lost his right to the office, and the right being gone, there was nothing to contest.

We cannot agree with this construction of the section, or accord with the reasoning which is indulged in to sustain it. It is not the apparently perfect right to the office which alone the elector may contest; such a right as is presumed from the issuance of a certificate of election and due qualification under the law; but it is the presumptive right to the office, which results from the fact that the board of supervisors, sitting as a canvassing board, has declared a person elected. It is this apparent official right, which their declaration creates, that may be contested. This is all the statute provides for. The canvassing board is the only body authorized under the election law to declare, from the returns, what candidates are elected, and when the section concerning contests says, that an elector may "contest the right of any person *declared elected* to an office," it means the apparent right which the declaration of such board creates.

No other right is involved. And the jurisdiction of the court to entertain, or the right of the elector to commence such contest, does not, in any manner, depend upon whether the person so declared to be elected by the board qualifies for the office by filing his official oath and bond or not. It is not necessary that he qualify to confer jurisdiction, nor can the court be divested of jurisdiction because he fails to do so.

The object of a contest, which is initiated upon the ground of malconduct on the part of the board of judges of election, is not to examine into matters transpiring subsequent to the declaration of the canvassing board, and which may strengthen or weaken the claim of the person declared elected by it. It has a far more effective and extended purpose. The contest attacks the election itself. It is not concerned with the certificate of election, or the proceedings subsequent thereto, which are merely the *indicia* of the right to enter upon the duties of the office, but goes back of all these to the fountain source of official title, and ascertains whether the sovereign will, as expressed at the polls, and upon which the canvassing board assumes to declare the result of the election, has by such declaration, been fairly, honestly, and legally expressed.

It probes into and examines the conduct of the election officers upon whose returns the canvassing board acts; it re-

canvasses the votes cast and ascertains whether the person declared elected by such canvassing board had the highest number of legal votes, and as a result the law requires the court, "if in any . . . case it appears that another person than the one *returned* has the highest number of legal votes," to "declare such person elected." (Code Civ. Proc., sec. 1123.)

From the use of the term "the one returned" in the quoted section, it is quite obvious that the right to office which is being investigated by the court in the contest, is such right only as the "election returns" (Pol. Code, sec. 1281) disclose exist in favor of a candidate, as it is from the face of those returns, and from no other data, that the canvassing board declares who is elected.

In addition to what has been said, and aside from the consideration given to the language alone of the section for the purpose of determining its meaning, it must be borne in mind that the right to contest is not designed exclusively for the benefit of rival candidates in an election. The right to a public office is not a matter which concerns them alone, nor is it the interest alone of the contending individuals that is to be considered in a contest. As far as they are concerned, their interest is exclusively a personal and pecuniary one. Paramount to their claims is the deep public concern involved as to who are entitled to hold an office for which the suffrages of the electors have been cast. According to the view of counsel for appellant, this interest is entirely lost sight of, and the contest becomes one between individual aspirants, involving personal interests. This is not the correct view. No special right of contest is given to a candidate as such. The right is conferred upon any elector, and can only be invoked as an elector, and when so invoked the contest is regarded as of a public nature where irregularities and frauds at the ballot-box, or in the vote, or official misconduct of the election officers are investigated, so that by a purgation of the polls, if necessary, the right of the electors to have such public officers as have been honestly and legally elected by them assume their offices, is sustained and enforced. This doctrine finds expression in the case of *Minor v. Kiddler*, 43 Cal. 236; where this court says: "It is the wholesome purpose of the

statute to invite inquiry into the conduct of the popular elections. Its aim is to secure that fair expression of the popular will in the selection of public officers, without which we can scarcely hope to maintain the integrity of the political system under which we live. With this view, it has provided the means of contesting the claims of persons asserting themselves to have been chosen to office by the people. It has not authorized every citizen or member of the body politic at large to institute proceedings for that purpose, but has limited the authority in that respect to those who are themselves electors, and it has required the statement of the grounds of contest in every instance to be verified by the oath of the contestant. When such a statement is presented by an elector to the tribunal, whose duty it is to investigate its merits, it should not be received in a spirit of captiousness, nor put aside upon mere technical objections designed to defeat the very search after truth which the statute intended to invite.

"The investigation proposed is one in which the public at large are deeply concerned. It certainly involves a question of broader import than the mere individual claim of a designated person to enjoy the honors and emoluments of the particular office brought directly in contest. The inquiry must be as to whether or not the popular will in the selection of officers to administer the public affairs has been, in a given instance, or is about to be defeated or thwarted by mistake happened, or fraud concocted. It is, therefore, not an ordinary adversary proceeding, for, as against this high public interest concerned, there can be no recognized adversary. . . . The public interests imperatively require that the ultimate determination of the contest should in every instance, if possible, reach the very right of the case."

This construction placed by the court upon the statute, and which inspired it to declare, that a contest is not an ordinary adversary proceeding, that there can be no recognized adversary, and that the ultimate determination of the contest should reach the heart of the case, would be of no consequence if the failure to qualify by the person declared elected, could deprive the court of jurisdiction to hear or determine a contest.

If the section were to be construed, as counsel contends, any person elected could, by simply failing to qualify, ef-

fectually cut off all inquiry into the most flagrant frauds practiced by election officers, whereby such person was not only declared elected, but another regularly entitled to the office defeated. It may well happen in a contest inaugurated by an elector, other than a candidate, against the person returned elected, or, even when inaugurated between two rival candidates, where several other candidates besides themselves sought election to the same office, that the court may find, in the first instance, that the contestee was not elected, or, in the second, that neither the contestant nor the contestee were elected, but that some other candidate was.

When this is shown, it is provided by section 1122 and 1123 of the Code of Civil Procedure, relative to such contests, that the court must annul the election of the person returned, and declare such other person elected. This result could never be attained if the right which is to be contested is the absolute right or title to the office, as appellant contends. It is, however, a matter of plain and easy accomplishment, if the right which the section declares may be contested is simply the right to the office which accrues solely from having been "declared elected" thereto by the canvassing board. Under the construction claimed by appellant the policy of the law is thwarted, the sovereign will defeated, and the jurisdiction of the court lost by the failure of a person to qualify for an office to which he was never legally elected.

Under the other construction the public interest in honest elections is conserved, the popular will given effect, and a judgment rendered, as the law designs it shall be, irrespective of who are the parties to a contest, giving the office to the one shown to have been legally elected thereto. This last is the end which the law has in view, and it is fully effected when the inquiry under the contest is addressed solely to the validity of the right which exists from the fact that he has been "declared elected" by the canvassing board, unaffected by any subsequent action, or inaction of such person, which may have destroyed such right.

It is further claimed by counsel for appellant that, instead of instituting proceedings in the nature of a contest, respondent should have commenced proceedings in the nature of *quo warranto*. There is nothing in this point, nor does it merit extended consideration.

If the appellant had qualified, it could not be seriously contended that proceedings in the nature of a contest would not be a proper remedy, and, as we have concluded that his failure to so qualify did not affect that right, it is unnecessary to further discuss the question of *quo warranto*.

The judgment is affirmed.

McFarland, J., Angellotti, J., Shaw, J., Van Dyke, J., Henshaw, J., and Beatty, C. J., concurred.

[S. F. No. 3033. Department Two.—January 12, 1904.]

HENRY GRUNDEL, Administrator, etc., Respondent, v.
UNION IRON WORKS, Appellant.

ACTION FOR DEATH—VESSEL TIED TO PRIVATE WHARF—INSECURE GANG-PLANK—LICENSE—NEGLIGENCE NOT IMPUTED—INSUFFICIENT COMPLAINT.—A complaint in an action for death, alleging that the defendant corporation had caused a vessel in its possession to be tied to its private wharf, and had placed an insecure gang-plank from the wharf to the vessel, and that deceased, "having business to perform upon the vessel," lost his life while attempting to board it, as the result of the slipping of the gang-plank, but not stating any employment by or business with the defendant, or permission from the defendant to be upon the premises, does not show that deceased was not a trespasser, but, construing it most favorably, as showing that deceased was a mere licensee, it shows no duty owed to him by the defendant to keep the premises or passageway in a secure condition, and no negligence which can be imputed to the defendant, and does not state a cause of action.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

Wilson & Wilson, for Appellant.

The complaint fails to show any duty owed by defendant to plaintiff, or any actionable negligence. (*Schmidt v. Bauer*,

80 Cal. 565, 568; *Kennedy v. Chase*, 119 Cal. 640;¹ *Faris v. Hoberg*, 134 Ind. 269, 274;² *Sweeney v. Old Colony etc. R. R. Co.*, 10 Allen, 372;³ *Brehmer v. Lyman*, 71 Vt. 98; *Dobbins v. Missouri etc. R. R. Co.*, 91 Tex. 62;⁴ *Evansville etc. R. R. Co. v. Griffin*, 100 Ind. 221-223;⁵ *Vanderbeck v. Hendry*, 34 N. J. L. 467, 471; *Matthews v. Bonsee*, 51 N. J. L. 30; *Parker v. Portland Pub. Co.*, 69 Me. 173, 176;⁶ *Taylor v. Haddonfield etc. Turnpike Co.*, 65 N. J. L. 102; *Reardon v. Thompson*, 149 Mass. 267; *Redigan v. Boston and Maine R. R. Co.*, 155 Mass. 44;⁷ *Moffatt v. Kenney*, 174 Mass. 311, 315; *Splittrof v. State*, 108 N. Y. 205; *Cusick v. Adams*, 115 N. Y. 55;⁸ *Murphy v. City of Brooklyn*, 118 N. Y. 575; *Gibson v. Leonard*, 143 Ill. 182;⁹ *Victory v. Baker*, 67 N. Y. 366; *Clapp v. La Grill*, 103 Tenn. 164; 2 Shearman and Redfield on Negligence, sec. 705; 1 Thompson on Negligence, sec. 976.)

Sullivan & Sullivan, for Respondent.

Grundel was on the premises by implied invitation, and the defendant is liable for his resulting death. (*Phillips v. Library Co.*, 55 N. J. L. 307; *Spry Lumber Co. v. Duggan*, 182 Ill. 220; *Carlton v. Tranconia Iron Co.*, 99 Mass. 217; Wood on Railroads, Minor's ed., pp. 1627, 1628; Thompson on Negligence, sec. 965; *Tobin v. Portland etc. Ry. Co.*, 59 Me. 183;¹⁰ *Campbell v. Portland Sugar Co.*, 62 Me. 552;¹¹ *Bennett v. Railway Co.*, 102 U. S. 126; *Mulchey v. Methodist Society*, 125 Mass. 487; *Pompionio v. N. Y. and R. Co.*, 66 Conn. 528;¹² *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262; *Newark E. L. P. Co. v. Garden*, 78 Fed. 74; 39 U. S. App. 416; *Welch v. McAllister*, 15 Mo. App. 492, 496, 497, 498; *Powers v. Harlow*, 53 Mich. 507;¹³ *Drennan v. Grady*, 167 Mass. 415; *Holmes v. Railway Co.*, L. R. 4 Ex. 254; *Evansville etc. R. R. Co. v. Griffin*, 100 Ind. 221;¹⁴ *Indiana B. and W. Ry. Co. v. Barnhart*, 115 Ind. 408; *Lowe v. Salt Lake City*, 13 Utah, 91.¹⁵)

¹ 63 Am. St. Rep. 153.

² 39 Am. St. Rep. 261.

³ 87 Am. Dec. 644.

⁴ 66 Am. St. Rep. 856.

⁵ 50 Am. Rep. 783.

⁶ 31 Am. Rep. 262.

⁷ 31 Am. St. Rep. 520, and note.

⁸ 12 Am. St. Rep. 772.

⁹ 86 Am. St. Rep. 376.

¹⁰ 8 Am. Rep. 415.

¹¹ 16 Am. Rep. 503.

¹² 50 Am. St. Rep. 124.

¹³ 51 Am. Rep. 154.

¹⁴ 50 Am. Rep. 783.

¹⁵ 57 Am. St. Rep. 708.

HENSHAW, J.—This action was to recover damages from the Union Iron Works for negligently causing the death of the plaintiff's intestate, Frank Grundel. The complaint charged that upon the 28th of December, 1893, a certain sailing-vessel named Gracie S. was in the possession and under the control of the defendant; that while so under its control the vessel was placed alongside of a wharf belonging to the defendant; that for the purpose of affording a passageway to and from the vessel the defendant on that day extended a gang-plank from the wharf to the vessel; that the gang-plank was negligently, insecurely, and defectively attached to the wharf and the vessel; that "Frank Grundel, having business to perform upon said vessel, attempted to board the same by walking on said gang-plank from said wharf to said vessel." While so walking, by reason of the insecure, negligent, and defective manner in which the gang-plank was placed, it slipped, and in slipping caused Grundel to fall against the rail of the vessel, fracturing his skull and inflicting fatal injuries.

This complaint does not state a cause of action, and the demurrer interposed to it, for that reason, should have been sustained. The allegations show that the Union Iron Works had caused a vessel in its possession to be tied to its private wharf, and had placed a gang-plank between the wharf and the vessel. It is alleged that Grundel, "having business to perform upon the vessel," attempted to board it by means of the gang-plank. There is no pretense that Grundel was in the employ of the Union Iron Works, that he had been invited by the Union Iron Works to enter upon its premises, or to go upon the vessel, or that his business was in any way connected with the defendant. It is not even pretended that he had permission of the Union Iron Works to be upon the premises. His business, for aught that appears, might have been wholly foreign to any of the interests of the Union Iron Works, or even in hostility to it. It is not shown, therefore, that he was not a trespasser, and, under the most favorable view which could be taken of the pleading, he was at the best a mere licensee. As such licensee, the defendant owed him no duty to keep its premises or its passageways in safe condition, and no duty being owed by defendant to plaintiff, no negligence can be imputed to the former. It would seem

unnecessary to cite cases in support of this doctrine, so well settled as to be beyond controversy, but there may be instanced *Schmidt v. Bauer*, 80 Cal. 565; *Kennedy v. Chase*, 119 Cal. 640;¹ *Faris v. Hoberg*, 134 Ind. 269;² *Brehmer v. Lyman*, 71 Vt. 98; *Dobbins v. Missouri etc. R. R. Co.*, 91 Tex. 62;³ *Evansville etc. R. R. Co. v. Griffin*, 100 Ind. 221;⁴ *Taylor v. Haddonfield etc. Turnpike Co.*, 65 N. J. L. 102; *Matthews v. Bonsee*, 51 N. J. L. 30; *Parker v. Portland Pub. Co.*, 69 Me. 173;⁵ *Redigan v. Boston etc. R. R. Co.*, 155 Mass. 44;⁶ *Moffatt v. Kenney*, 174 Mass. 311; *Cusick v. Adams*, 115 N. Y. 55;⁷ *Gibson v. Leonard*, 143 Ill. 182;⁸ 2 Shearman and Redfield on Negligence, sec. 705; Cooley on Torts, p. 358.

For the foregoing reasons the judgment and order are reversed, with directions to the trial court to sustain the defendant Union Iron Works' demurrer to the complaint.

McFarland, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[S. F. No. 3371. Department Two.—January 12, 1904.]

E. S. MERRIMAN, Respondent, v. MARY CATHERINE WICKERSHAM, Appellant.

VENDOR AND PURCHASER—SALE OF REAL-ESTATE AGENT—PERFORMANCE
—COMMISSION—RATIFICATION—REFUSAL TO COMPLETE SALE.—

Where the owner of real estate made a contract with a real-estate agent to effect a sale thereof, and the contract fixed the right of the agent to a commission upon his sale, the agent has performed his part of the contract by producing a purchaser able and willing to buy, and the owner's liability for the commission agreed upon is then complete; and where the owner ratified and approved the sale in writing, the commission cannot be avoided by any arbitrary or wanton refusal by him to consummate the sale.

¹ 63 Am. St. Rep. 153.

² 39 Am. St. Rep. 261.

³ 66 Am. St. Rep. 856.

⁴ 50 Am. Rep. 783.

⁵ 31 Am. Rep. 262.

⁶ 81 Am. St. Rep. 520, and note.

⁷ 12 Am. St. Rep. 772.

⁸ 36 Am. St. Rep. 376.

ID.—ACTION BY CORPORATION—SUBSTITUTION OF EXECUTOR—EVIDENCE—OFFICER AND STOCKHOLDERS NOT DISQUALIFIED.—Where the real-estate agent employed was a corporation, and pending suit for the commission the executor of the deceased owner was substituted as a party defendant, an officer, and one of the principal stockholders, of the corporation is not disqualified as a witness, under section 1880 of the Code of Civil Procedure, as being a party to the action; and where it was not established that he was a "person in whose behalf the action was prosecuted," his testimony to facts occurring before the death of the owner was properly admitted.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. M. C. Sloss, Judge.

The facts are stated in the opinion of the court.

Campbell, Metson & Campbell, and Thomas H. Breeze, for Appellant.

The contract called for a sale, and not for a negotiation for a sale. The only question is what the contract provides. (*Kimmel v. Skelly*, 130 Cal. 555.) The action is on an express contract pleaded, and the recovery on an implied contract was proved. The variance is fatal. (*Reed v. Norton*, 90 Cal. 590; *Wagner v. Hansen*, 103 Cal. 104; *Jones v. Shuey*, 40 Pac. Rep. (Cal.) 17.) The court erred in allowing the vice-president, and one of the principal stockholders, of the corporation plaintiff to testify to facts occurring before the death of the deceased owner. (Code Civ. Proc., sec. 1880.)

Edward C. Harrison, for Respondent.

A sale was made by plaintiff and ratified by the owner, and the commission was earned. The owner could not avoid it by a wanton refusal to convey. (*Crane v. McCormick*, 92 Cal. 176-182; *Smith v. Schiele*, 93 Cal. 144-149; *Mason v. Jones*, 128 Cal. 77; *Kimmel v. Skelly*, 130 Cal. 555; *Gregory v. Bonney*, 135 Cal. 589.) The witness Marsh was properly allowed to testify. (*Poulson v. Stanley*, 122 Cal. 655-658; *Savings Bank v. Enos*, 135 Cal. 167.)

HENSHAW, J.—Plaintiff is the assignee of the Burnham & Marsh Company (a corporation), real-estate brokers.

The action is for commissions due upon an alleged sale for F. A. Wickersham. Suit was commenced against Wickersham in his lifetime. He suffered default. Plaintiff afterwards consented that his default might be set aside. His death following, his executrix was substituted as defendant.

Wickersham had given to the Burnham & Marsh Company a power of attorney to sell certain described property for the sum of thirty thousand dollars. The instrument provided: "I hereby agree to pay to said Burnham & Marsh Company two and one half per cent commission on the amount of the sale if a purchaser is found by or through said Burnham & Marsh Company, or myself, or any other person, during said period (of ten days), or if sold thereafter to any person having received information of said property through the said Burnham & Marsh Co." The complaint pleaded, and the court found, that after the expiration of the ten days the Burnham & Marsh Company, acting as the broker of Wickersham, negotiated a sale of the property, and sold it for him to one G. L. Page, for the sum of thirty thousand dollars, and received from Page a deposit upon the sale in the sum of one thousand dollars, and that this sale was on the sixth day of February, 1901, with all its terms and conditions as specified in the receipt given to and taken by Page, ratified in writing by Wickersham; and further, that Page first received information of the fact that the property was for sale by Wickersham through the Burnham & Marsh Company. Thereafter, and without just cause or reason, Wickersham refused to consummate the sale, and instructed the Burnham & Marsh Company to return to Page his deposit, which was accordingly done.

The evidence supports the findings so made. It appears that Wickersham was present at the execution of the contract between the Burnham & Marsh Company and Page. That contract was in form an acknowledgment of the receipt of the sum of one thousand dollars "in part payment for purchase price, thirty thousand dollars, of the property known and described as follows," etc. It further appears that Wickersham evidenced his acceptance and approval of the sale by his signature upon the instrument.

It is contended by appellant, however, that the contract

between Wickersham and the Burnham & Marsh Company, contemplated an actual and completed sale, and that, as Wickersham repudiated the contract before its full execution by the transfer of title, he was not bound to pay the commissions contemplated. But the answer to this is two-fold. First, the contract which Wickersham approved was a sale of his property, and thus the literal terms of his contract with the Burnham & Marsh Company had been complied with. It was a conditional sale, to be sure, but none the less it was a sale. Second, the law as to this contract is no different from the law as to brokers' contracts generally; that is to say, where the contract fixes the broker's right to remuneration upon his sale, if he shall produce a purchaser able and willing to buy, he has performed his part of the contract, and the owner's liability for his compensation or commission is complete, and cannot be avoided by any arbitrary or wanton refusal to consummate the sale. (*Crane v. McCormick*, 92 Cal. 176; *Smith v. Schiele*, 93 Cal. 144; *Gregory v. Bonney*, 135 Cal. 589.)

The Burnham & Marsh Company is a corporation. Mr. Marsh, vice-president, and one of its principal stockholders, was allowed to testify to matters and facts in issue. It is contended that the evidence was improperly admitted, in violation of section 1880 of the Code of Civil Procedure, which provides that: "The following persons cannot be witnesses: . . . Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person." At common law interest disqualified any person from being a witness. That rule has been modified by statute. In this state interest is no longer a disqualification, and the disqualifications are only such as the law imposes. (Code Civ. Proc., sec. 1879.) An examination of the authorities from other states will disclose that their decisions rest upon the wordings of their statutes, but that, generally, where interest in the litigation or its outcome has ceased to disqualify, officers and directors of corporations are not considered to be parties within the meaning of the law. For example, the statute of Maryland (Maryland Public General

Laws, art. 35, sec. 2) limits the disability to the "party" to a cause of action or contract, and it is held that a salesman of a corporation who is also a director and stockholder is not a party within the meaning of the law so as to be incompetent to testify in an action by the company against the other party who is insane or dead. (*Flach v. Gottschalk Co.*, 88 Md. 368.¹) To the contrary, the Michigan law expressly forbids "any officer or agent of a corporation" to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person. (Howell's Annot. Stats. Mich., sec. 7545.) The supreme court of Michigan, in refusing to extend the rule to agents of partnerships, said: "It is conceded that this testimony does not come directly within the wording of the statute, but it is said there is the same reason for holding the agent of a partnership disqualified from testifying, that there is in holding the agent of a corporation. This is an argument which should be directed to the legislative rather than to the judicial department of government. . . . The inhibition has been put upon agents of corporations, and has not been put upon agents of partnerships. We cannot, by construction, put into the statute what the legislature has not seen fit to put into it." (*Demary v. Burtenshaw's Estate* (Mich.), 91 N. W. 649.) In New York the statute provides that against the executor, administrator, etc., "no party or person interested in the event, or person from, through, or under whom such party or interested person derives his interest or title shall be examined as a witness in his own behalf or interest." This is followed by the exception that a person shall not be deemed interested by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof. (New York Annot. Code Civ. Proc., sec. 829.) Here it is apparent that the interest of the witness is made a disqualification, and it is of course held that stockholders and officers of corporations other than banking corporations are under disqualification. (*Keller v. West Bradley Mfg. Co.*, 46 Hun, 348.)

To like effect is the statute of Illinois, which declares that no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to

¹ 71 Am. St. Rep. 418, and note.

testify under the given circumstances. Under this statute it is held that stockholders are interested within the meaning of the section, and are incompetent to testify against the representatives of the deceased party. (*Albers Commission Co. v. Sessel*, 193 Ill. 153.) The law of Missouri disqualifies "parties to the contract or cause of action," and it is held that a stockholder, even though an officer of the bank, is not disqualified by reason of his relation to the corporation when he is not actually one of the parties to the making of the contract in the interest of the bank.

Our own statute, it will be observed, is broader than any of these. It neither disqualifies parties to a contract, nor persons in interest, but only parties to the action (Code Civ. Proc., secs 1879, 1880), and thus it is that in *City Savings Bank v. Enos*, 135 Cal. 167, it has been held that one who is cashier and at the same time a stockholder of a bank was not disqualified, it being said: "To hold that the statute disqualifies all persons from testifying who are officers or stockholders of a corporation, would be equivalent to materially amending the statute by judicial interpretation." It is concluded, therefore, that our statute does not exclude from testifying a stockholder of a corporation, whether he be but a stockholder, or whether, in addition thereto, he be a director or other officer thereof.

The examination of the witness Page undoubtedly discloses that he had an interest in the outcome of the litigation, but that fact did not bring his testimony within the inhibition of the law. It was not established that he was a person "in whose behalf the action was prosecuted," and his testimony was therefore properly admitted.

For the foregoing reasons the judgment and order appealed from are affirmed.

McFarland, J., and Lorigan, J., concurred.

[S. F. No. 2838. Department Two.—January 12, 1904.]

SUSAN M. FAY, Respondent, v. H. & V. STUBENRAUCH,
JAMES O'REILLY, and MRS. M. QUINN, Defendants;
MRS. A. M. QUINN, Appellant.

FORECLOSURE OF MORTGAGE—CLERICAL MISPRISION IN JUDGMENT—MISNOMER—POWER OF CORRECTION—APPEAL BY MISNAMED DEFENDANT.
—Where a defendant named in the complaint, summons, and default in action to foreclose a mortgage was by a clerical misprision misnamed in the judgment, by the insertion of an additional initial before the name, the court had the power at any time to correct the clerical misprision appearing upon the face of the record, and its right so to do was not suspended or impeded by an appeal from the judgment taken in the name of the misnamed defendant.

ID.—EFFECT OF CORRECTION PENDING APPEAL—CURE OF ERROR—AFFIRMANCE OF JUDGMENT—COSTS OF APPEAL.—The appeal by the misnamed defendant having been taken by a stranger to the record, the effect of the correction of judgment pending the appeal was to relieve the appellant from all liability under the judgment, and to cure the error appealed from. The judgment must therefore be affirmed; but as the error, until corrected, pending the appeal, substantially affected the appellant, the costs of appeal should be allowed.

APPEAL from a judgment of the Superior Court of Napa County. E. D. Ham, Judge.

The facts are stated in the opinion of the court.

W. H. Barrows, for Appellant.

Theodore A. Bell, and A. O. Colton, for Respondent.

LORIGAN, J.—This action was brought to foreclose a mortgage executed to plaintiff by defendants, H. & V. Stubenrauch. It was alleged in the complaint that the other defendants, James O'Reilly and one Mrs. M. Quinn, claimed some interest in the mortgaged premises; that the said Mrs. M. Quinn was in possession thereof, cutting and destroying trees, and threatening to continue to do so, and an injunction was prayed, prohibiting her from the commission of such acts. Summons was issued in said cause, and served on all

the defendants, including Mrs. M. Quinn, and the defaults of all the defendants, including said Mrs. M. Quinn, were duly entered.

Thereafter a decree of foreclosure was entered against the said H. & V. Stubenrauch, James O'Reilly, and one Mrs. A. M. Quinn, foreclosing all their interest in said premises, and as to the said Mrs. A. M. Quinn, enjoining her from cutting and destroying any trees upon said premises.

This decree was duly entered on April 24, 1901. On May 16, 1901, an appeal was taken by Mrs. A. M. Quinn from said decree.

On May 21, 1901, after such appeal was taken, the court, on motion of the attorney for plaintiff, made an order reciting that there had been a clerical misprision in the decree of foreclosure in the insertion of the initial "A" before the initial "M" in the name of Mrs. M. Quinn, the defendant in said action, and ordered the decree corrected by striking out such initial "A" wherever it appeared therein. A stipulation in the transcript shows that such correction was made by the clerk as directed by the court. The effect of the order is, that the decree of foreclosure now stands against Mrs. M. Quinn, and the name of Mrs. A. M. Quinn nowhere appears therein.

Appellant contends that, notwithstanding such correction, the decree of foreclosure should be reversed; that the order of the lower court was, in effect, an amendment of the decree, and being made after the court had lost jurisdiction of the cause by appeal, was void.

There is no question but that if an appeal had not been taken, the lower court would have had the power to make the correction.

It is quite manifest that the use of the initial "A" in the name of the defendant, so as to make her name read Mrs. A. M. Quinn, instead of Mrs. M. Quinn, was merely a clerical error in the decree. Mrs. A. M. Quinn was not a party to the suit, but Mrs. M. Quinn was. The latter was named as defendant, had been served with summons and suffered default, and a decree might properly be taken against her. All these matters appear in the record, and conclusively show that the person against whom the decree was intended to be entered

was Mrs. M. Quinn, not *Mrs. A. M. Quinn*, who, as far as the record is concerned, was an entire stranger to the proceedings.

Whenever it is apparent upon the face of the record, that the error to be corrected consists of a clerical misprision, the court has always inherent power to correct it. (*Estate of Schroeder*, 46 Cal. 316; *Fallon v. Brittan*, 84 Cal. 511; *San Joaquin L. and W. Co. v. West*, 99 Cal. 347; *Chicago Clock Co. v. Tobin*, 123 Cal. 378.)

Nor is the right of the lower court to amend suspended or impeded by an appeal, where an amendment does not affect any substantial rights of the appellant, and consists of the correction of a clerical mistake appearing upon the face of the record. It is true that the court by the appeal loses jurisdiction of the cause, for the purposes of the appeal, but it does not lose jurisdiction of its records. These remain within its physical control and custody, and as to the error suggested the court had a right, as well after the appeal is taken, as before, to amend it. (Black on Judgments, sec. 162; Freeman on Judgments, sec. 73; *People v. Murback*, 64 Cal. 372.) Certainly no substantial right of the appellant was affected by the amendment. In fact, it accomplished all that she could hope for on this appeal. Her complaint here is, that the decree against her was void. This is true, but as the correction of that decree relieved and freed her from all liability under it, there is nothing left of which she can complain. The decree now stands against Mrs. M. Quinn, the party to the action, against whom, as appears from the record, it should have been originally entered. If this court should reverse the judgment, as appellant contends it should, such reversal would confer no benefit upon the appellant; it would give her nothing she has not already obtained through the correction of the decree by the lower court, but, on the contrary, such reversal would operate to the advantage of the party against whom apparently the decree should have been originally and it is now entered—the defendant, Mrs. M. Quinn—who is not now before us asking for any relief. Appellant cannot be concerned in the matter any further than to the extent that her own interests are involved.

We are satisfied that the lower court, notwithstanding the appeal, had a right to correct the apparent clerical error in

the decree; that such correction has relieved appellant entirely from its operation; that the error she complains of here has been effectually cured thereby, and that the judgment, as far as it is attacked by her on this appeal, should be affirmed.

As this error, until it was corrected, substantially affected appellant, and was not corrected until after her appeal was taken, we think that she should, therefore, be allowed her costs on appeal.

The decree appealed from is affirmed, with costs in favor of appellant.

McFarland, J., and Henshaw, J., concurred.

[S. F. No. 2557. Department One.—January 12, 1904.]

ESTHER E. SWORTFIGUER, Appellant, v. CHARLES T. WHITE et al., Respondents.

ACTION TO FORECLOSE MORTGAGE—DISMISSAL—FAILURE TO SERVE AND RETURN SUMMONS.—An action to foreclose a mortgage, in which there was a failure to serve and return the summons within three years after the commencement of the action, and in which there was no appearance within that period, must imperatively be dismissed under the mandatory provision of subdivision 7 of section 581 of the Code of Civil Procedure.

ID.—LOSS OF JURISDICTION—AMENDED AND SUPPLEMENTAL COMPLAINT BY THIRD PARTY—VOID LIMITATION OF JUDGMENT OF DISMISSAL.—After the court had lost all jurisdiction of the action by a dismissal thereof, the filing of an amended and supplemental complaint by a third party substituted as plaintiff in the same action, more than four years after its commencement, and the subsequent appearance of one of the original defendants therein, cannot revive the former action so as to change the result; and an amended judgment limiting the former judgment of dismissal of the action to the original mortgagor, upon whose motion it was dismissed, was *ultra vires* and void.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco dismissing an action. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Pringle & Pringle, for Appellant.

The amended and supplemental complaint was virtually the commencement of a new action to foreclose a new mortgage bearing a greater rate of interest, made subsequent to the filing of the complaint, between different parties, the summons in which was issued within one year and served and returned within three years. (*Anderson v. Mayers*, 50 Cal. 525; *Atkinson v. Amador etc. Co.*, 53 Cal. 102, 105; *Jeffries v. Cook*, 58 Cal. 147; *Meeks v. Southern Pacific R. R. Co.*, 61 Cal. 149; *Peiser v. Griffin*, 125 Cal. 9; *Stockton etc. Works v. American Fire Ins. Co.*, 121 Cal. 182.)

William H. Jordan, Jordan, Treat & Brann, and W. H. Barrows, for Respondents.

An appearance after three years cannot preclude a motion to dismiss for failure to return the summons within that period. (*Grant v. McArthur*, 137 Cal. 270.) The writ of prohibition was *res adjudicata*. (*White v. Superior Court*, 126 Cal. 245.)

VAN DYKE, J.—This is an appeal from the judgment of the lower court dismissing the action. The defendant White, on the ninth day of July, 1888, made his promissory note to La Société d'Epargnes et de Prévoyance Mutuelle (a corporation), and on the same day executed a mortgage on his land to secure said note. On July 8, 1893, said corporation mortgagee commenced an action to foreclose said mortgage; summons was issued the same day, but was never served or returned. R. M. Murray and E. H. Hansen were made defendants, for the reason, as alleged in the complaint, that they claimed some interest in the premises covered by the mortgage. Defendant Hansen filed an appearance January 31, 1899, but there is no evidence in the record that defendant Murray ever appeared. Defendant White, instead of appearing in the action, procured Thomas M. Quackenbush to advance the money to satisfy the claims of the mortgagee, the French bank, and to give him further time to make pay-

ment. Quackenbush thereupon paid the amount due the original mortgagee, the French bank, and took an assignment of the mortgage and of the cause of action, and allowed the matters thereafter to rest until November 11, 1896, when he assigned and transferred the notes and mortgages to his daughter, Esther E. Swortfiguer, who thereafter, on August 10, 1897, was substituted as plaintiff. And thereafter, on August 7, 1898, the substituted plaintiff and appellant herein filed an amended and supplemental complaint in said action, and caused a second *alias* summons to be issued thereon. The first *alias* summons issued before the filing of said supplemental complaint had been quashed on motion of the defendant White, and thereafter the second *alias* summons was likewise quashed for some informality. At the time of the motion to quash the second *alias* summons defendant White moved the court to dismiss the action. The court refused to dismiss the action, and announced that it would issue a third *alias* summons upon the payment by the plaintiff of the sum of twenty-five dollars costs, which was tendered and refused. and thereupon said defendant and respondent White applied to this court for a writ of prohibition directed against the superior court, and upon the hearing of that application this court issued a peremptory writ of prohibition. (*White v. Superior Court*, 126 Cal. 245.) In the opinion of the court in that case it is said: "Petitioner has a present right to the dismissal of the action as against himself, and the removal of the lien by which his property is encumbered, and such right cannot be protected or enforced by an appeal from a possible judgment in the action to foreclose." In *Vrooman v. Li Po Tai*, 113 Cal. 302, referred to and approved in *White v. Superior Court*, the provision of the Code of Civil Procedure, as amended in March, 1889, was set out and construed; the amendment adds subdivision 7 of section 581, and reads as follows: "And no action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year, and served, and re-

turn thereon made within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years." In commenting upon that amendment to the section in question, this court, in the case of *Li Po Tai*, said: "This provision is very sweeping, and is expressly made applicable to pending suits. It is prohibitory, otherwise it would have no force at all. The courts were already authorized and required to dismiss suits upon motion when there had been culpable failure to prosecute. To hold this statute directory would therefore be to repeal it. Then the language could hardly indicate more plainly the intent that it should be mandatory. Besides being absolute in form, it contains a prohibitory clause—'and no further proceedings shall be had therein.' Such a negative cannot be, and never has been, considered as directory merely." (See, also, to the same effect, *Grant v. McArthur*, 137 Cal. 270.) It is stated in appellant's brief that defendants Hansen and Murray appeared in said action. The record fails to show that Murray ever appeared, and the appearance of Hansen was over five years from the commencement of the action; and under the mandatory provisions in question of the Code of Civil Procedure and the decisions of this court such appearance cannot help out the case of the appellant. There having been no service and return made of the summons within three years from the commencement of the action, or appearance within that time by any of the defendants, that action was practically put an end to, and it was the imperative duty of the court to have dismissed it at the expiration of three years from its commencement; and the substitution of the appellant in place of the former plaintiff in that action, the French bank, over four years after the commencement of the action, and the filing of a so-called amended supplemental complaint thereafter could not revive the former action so as to change the result.

The order and judgment entered March 23, 1900, dismissing the action—from which this appeal is taken—was in accordance with the imperative command of the law. The court below thereupon lost all jurisdiction over the cause, and the so-called amended judgment of dismissal entered September 21, 1900, attempting to limit the former judgment

of dismissal to defendant White alone, was *ultra vires* and void.

The judgment dismissing the action is affirmed.

Angellotti, J., concurred.

Shaw, J., concurred in the judgment.

A rehearing in Bank was denied February 11, 1904. Beatty, C. J., delivered the following opinion, dissenting from the order:—

BEATTY, C. J., dissenting.—I dissent from the order denying a rehearing, not because I differ with the court as to any points decided, but because the Department opinion completely ignores the only proposition upon which the appellant contended for a reversal,—the only proposition, that is to say, which at the close of the argument was contested. When Quackenbush furnished the money to satisfy the claim of the original mortgagee and took an assignment of its mortgage, he at the same time took from White a new mortgage to secure a new obligation. The supplemental complaint filed by appellant in 1897 counted upon this new mortgage, and within less than three years after the filing of the supplemental complaint the respondent Hansen entered his appearance in the action. The contention of appellant—and it was all he contended for in submitting his case—was, that as to the second mortgage, and the moneys thereby secured, the filing of the supplemental complaint was, in legal effect, the commencement of a new action, and that the voluntary appearance of Hansen within three years thereafter gave the court jurisdiction to foreclose the second mortgage as against him. This proposition may or may not be sound, but whether tenable or not, I think, since it presented the only question in the case, the appellant was entitled to have it stated and decided.

[Crim. No. 1006. Department Two.—January 13, 1904.]

THE PEOPLE, Appellant, v. CLEMENTE PERALES, Respondent.

CRIMINAL LAW—SUFFICIENCY OF INFORMATION—LANGUAGE OF STATUTE

—**QUALIFICATION OF RULE.**—The general rule that it is sufficient in an information to charge an offense in the language of the statute is subject to the qualification that where a more particular statement of facts is necessary in order to charge the offense definitely and certainly, it must be made.

ID.—GENERAL WORDS OF STATUTE.—Where the words or terms used in the statute have no technical or precise meanings which of themselves imply the offense, or where the particular facts or acts which constitute it are not specified, but from the general language used many things may be done which may constitute an offense, it is necessary to set forth the particular things or acts done with reasonable certainty and distinctness.

ID.—ASSAULT “BY MEANS LIKELY TO PRODUCE GREAT BODILY INJURY” —“HEAVY WOODEN STICK.”—An information charging the defendant generally with the crime of assault “by means likely to produce great bodily injury, to wit, with a heavy wooden stick,” is not a sufficient designation of the offense. The word “heavy” is too indefinite, and there is no description as to the weight, strength, or size of the stick, or other qualities, properties, or characteristics, showing that it was a means likely to produce great bodily injury.

APPEAL from a judgment of the Superior Court of San Diego County. N. H. Conklin, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, E. B. Power, Deputy Attorney-General, and Cassius Carter, District Attorney, for Appellant.

J. S. Callen, Attorney for Defendant in Superior Court, made no appearance for Respondent.

LORIGAN, J.—This is an appeal from a judgment sustaining a demurrer to an information. The charging part of the information is as follows: “Clemente Perales is accused by the district attorney of the county of San Diego, state of California, by this information, of the crime of assault by

means likely to produce great bodily injury, committed as follows: The said Clemente Perales, on the sixteenth day of November, A. D. 1902, in the said county of San Diego, state of California, and before the filing of this information, did unlawfully and feloniously commit an assault upon the person of J. M. Soto, by means likely to produce great bodily injury, to wit, with a heavy wooden stick, contrary to the form and effect of the statute," etc.

The demurrer challenged the sufficiency of this information on various grounds, among others that it did not substantially conform to the requirements of sections 950 and 952 of the Penal Code in this, that it did not set forth the particular circumstances, or statement of the acts, constituting the offense. The demurrer was sustained generally.

No appearance is made for the respondent on this appeal.

Section 245 of the Penal Code, under which this information was framed, reads: "Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable," etc.

It is not claimed, as we understand the position of the appellant, that the information is sufficient to charge assault with a deadly weapon, or that it sufficiently sets forth the means by which the assault was committed. But it is insisted that the words, "to wit, with a heavy wooden stick," may be treated as surplusage and rejected, and that the information is still good, because it charges the assault to have been committed "by means likely to produce great bodily injury," which is the exact language of the statute.

While it is the general rule that it is sufficient to charge an offense in the language of the statute, yet this rule is subject to the qualification, that where a more particular statement of facts is necessary in order to charge the offense definitely and certainly, it must be made. The statute may, and often does, define the offense by the use of precise and technical words which have a well-recognized meaning, or designates and specifies particular acts or means whereby an offense may be committed.

Under such circumstances, to charge the offense substantially in the language of the statute will be sufficient.

When, however, the words or terms used in the statute have no technical or precise meaning, which of themselves imply the offense, or where the particular facts or acts which shall constitute it are not specified, but, from the general language used, many things may be done which may constitute an offense, it is then necessary, in charging an offense claimed to be embraced within the general language of the statute, to set forth the particular things or acts charged to have been done, with reasonable certainty and distinctness, so that the court may determine whether an offense within the statute is charged, or one over which it has jurisdiction, and so that the defendant may be advised of the particular nature of it, in order to defend against it, and to plead in bar a judgment of conviction or acquittal thereof, if subsequently prosecuted.

The section in question affords an application of both rules. It particularly designates a deadly weapon as a means, the use of which shall constitute an assault. The term "deadly weapon" has a precise, well-recognized meaning, and the nature of such weapon as being one likely to produce great bodily injury is well understood. It is expressly declared by the statute a specific means, the use of which in making an assault shall constitute an offense, and, therefore, under the general rule, an assault with it may be pleaded in the language of the statute. The term, however, "or by any means of force" likely to produce great bodily injury, immediately following in the section, is a general and comprehensive term designed to embrace many and various means or forces, which, aside from a deadly weapon or instrument, may be used in making an assault. What these means or forces may be, other than that they must be such as are likely to produce great bodily injury, the statute does not declare or define. As an example of such means it specifies a deadly weapon; as to any other means its language is general and indefinite.

Under such circumstances, in charging an offense claimed to be embraced within the comprehensive terms of the section, the qualification to the general rule obtains, and applying it, as it properly should be applied, to the information under consideration here, it was not enough to charge the defendant, in the language of the statute, with the use generally of means likely to produce great bodily injury, but the information should have specified the particular means used, which it is

claimed constitute an offense within the general terms of the section; the information should, in that particular, conform to the rules of criminal pleading (Pen. Code, secs. 950-952), which require that the information shall contain a statement of the acts constituting the offense, and the particular circumstances of the offense charged, in such a manner as will enable a defendant to understand the nature of the accusation against him.

It will be observed that the information at bar conforms to none of these requirements. It is entirely general in its terms; there is no precise description of the offense; there is no proper or particular designation of the means which it is claimed were used in its commission. All information in that regard is retained by the pleader, while its proper place is on the face of the information.

If the information under review could be declared good because it charges in the general language of the section, we cannot, just now, conceive of any information charging an offense under the general language of any section of the Penal Code, which would be bad.

As previously said, we do not understand appellant to claim that the information is sufficient under the section because it charges the means used in making the assault to have been "a heavy wooden stick." The use of these words, as descriptive of the means, did not aid it either to charge an assault with a deadly weapon, or instrument, or by any means or force likely to produce great bodily injury.

A "heavy wooden stick" is not *ex vi termini* a deadly weapon, or a deadly instrument. Nor does this description suffice to show that it is either. Neither, as described, is it necessarily a means likely to produce great bodily injury. In fact, it is not described at all, except by the indefinite statement that it was "heavy." Describing a stick as "heavy" imparts no certain information; the term is relative; a stick which in the hands of a boy, or a feeble person, would be considered heavy, in the hands of a robust person would be deemed light. Again, it might be heavy, and yet so large and unwieldy as to be useless, in the hands of a powerful man, towards the commission of an assault. It might, too, be heavy,

and yet so small, or short, that no danger of bodily harm could reasonably be apprehended from its use.

Aside from the use of the term "heavy," there is no description in the information as to the definite weight, strength, or size of the stick, or other qualities, properties, or characteristics, showing that it was a means likely to produce great bodily injury.

The lower court properly sustained the demurrer to the information, and its order is affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[S. F. No. 2045. In Bank.—January 13, 1904.]

E. W. HURGREN, Appellant, v. UNION MUTUAL LIFE INSURANCE COMPANY, Respondent.

MALICIOUS PROSECUTION—LEGAL TERMINATION OF SUITS—DETERMINATION OF MERITS NOT REQUIRED.—In order to maintain an action for malicious prosecution the plaintiff must show that the prosecution of suits complained of as malicious had been legally terminated; but it is not necessary to show that there was a determination upon the merits. The prosecution may be regarded as terminated when it has been disposed of in such a manner that it cannot be revived, so that the prosecutor if he intends to proceed further must institute proceedings *de novo*.

ID.—BURDEN OF PROOF.—The burden of proof is upon the plaintiff not only to show that the action complained of as malicious had terminated, but also to show that it was commenced maliciously and without probable cause.

ID.—IMPROPER NONSUIT—EVIDENCE—REPEATED DISMISSAL OF UNFOUNDED ACTIONS—APPEARANCE FOR DEFENSE—MALICE—WANT OF PROBABLE CAUSE.—A judgment of nonsuit will be sustained, if sustainable, upon any ground assigned; but where the pleadings and proof showed that plaintiff applied to defendant for a policy of life insurance for one thousand dollars, and defendant tendered a policy for two thousand dollars, and demanded the premium therefor, which plaintiff refused to pay, and that defendant had brought three several suits for such premium, which plaintiff appeared to

defend, and each of which was dismissed by defendant, and there was evidence tending to show that the one who secured the application was defendant's agent, and that the suits were malicious and without probable cause, the granting of a nonsuit for want of proof that such suits were determined upon the merits, and for want of proof as to such agency, malice, and want of probable cause, was improperly granted.

ID.—ERROR IN STRIKING OUT PARTS OF COMPLAINT.—Where the court struck out from the complaint some redundant matter, but also struck out matter which was not redundant, and which related to the origin and causes of the suits complained of as malicious, and which left the complaint incomplete and without grammatical connection, the order striking out such proper matter was erroneous.

ID.—EVIDENCE OF AGENCY—NOTICE OF WITHDRAWAL OF AGENCY.—A notice published by the defendant while the lawsuit was pending, which stated that the one who solicited plaintiff's policy had been acting as agent for the defendant, but was no longer connected with the company defendant, and which tended to show the previous existence of the agency when the transaction alleged took place, was improperly excluded.

ID.—LETTER OF PLAINTIFF TO DEFENDANT.—A letter written from plaintiff to defendant before the third suit was commenced, the receipt of which was acknowledged by the defendant, and which informed defendant of what had occurred, and that the company's agent had raised the policy, etc., was admissible to show knowledge of the alleged fraud of the agent, and that the company was put on inquiry as to the facts before the last suit was commenced.

ID.—SUIT BY COLLECTOR—AUTHORITY FOR DISMISSAL—EVIDENCE—IMPROPERLY EXCLUDED.—Where one of the suits dismissed was brought in the name of a collector, to whom the claim for premium had been assigned for collection, and he was notified that the suit was dismissed, it was error for the court to refuse to allow the plaintiff to ask him at whose request it was dismissed, and whether he had orders therefor, and from whom.

ID.—UNEXPLAINED DISMISSAL—MALICE AND WANT OF PROBABLE CAUSE.—If the defendant procured the dismissal of the suit by the collector, without just reason shown therefor, that fact would be some evidence tending to prove malice and want of probable cause.

APPEAL from a judgment of the Superior Court of Sonoma County. S. K. Dougherty, Judge.

The facts are stated in the opinion of the court.

R. W. Miller, for Appellant.

The gist of the action is the malicious action of the defendant in putting the machinery of the court in operation upon

an unmeritorious and unfounded demand, and the nonsuit was improper. (*Clark v. Nordholdt*, 121 Cal. 26; *Eastin v. Bank of Stockton*, 66 Cal. 123, 126;¹ *Berson v. Ewing*, 84 Cal. 92.) The court erred in rejecting the letters offered by appellant. (*Pope v. Armsby Co.*, 111 Cal. 162.)

Myrick & Deering, and Van Ness & Redman, *Amici Curiae*.

D. E. McKinlay, and W. H. Sigourney, for Respondent.

The action for malicious prosecution is not favored in law, and the proof must be strict. (*Ball v. Rawles*, 93 Cal. 272;² *Lacey v. Porter*, 103 Cal. 597; *Wetmore v. Melinger*, 64 Iowa, 741;³ *Brown v. Smith*, 83 Ill. 291.) The nonsuit was proper. (*Grant v. Moore*, 29 Cal. 632; *Emerson v. Skaggs*, 52 Cal. 220.)

McFARLAND, J.—This is an action to recover damages against defendant for the alleged prosecution of certain civil suits against plaintiff maliciously and without probable cause. The court below granted a nonsuit, and gave judgment for defendant, and from the judgment plaintiff appeals.

The learned judge of the trial court granted the nonsuit upon the ground that it had not been shown that the former suits complained of as malicious had been determined *upon the merits* in favor of the defendant therein; and this view was sustained when the appeal was decided here in department. But upon further consideration of the question we are satisfied that, whatever may have been some of the former decisions in England and this country, it is now the well-established rule that a verdict or final determination upon the merits of the malicious civil suit or criminal prosecution complained of is not necessary to the maintenance of an action for malicious prosecution, but that it is sufficient to show that the former proceeding had been *legally terminated*. The fact that such legal termination would not be a bar to another civil suit or criminal prosecution founded on the same alleged cause is no defense to the action for malicious prosecution; otherwise, a party might be continuously harassed by one suit after another, each dismissed before any opportunity for a trial on

¹ 56 Am. Rep. 77.

² 52 Am. Rep. 465.

³ 27 Am. St. Rep. 174.

the merits. It is suggested that the plaintiff might commence the suit upon a perfectly good cause of action, and for some legal reason dismiss it, and afterward bring and successfully prosecute to judgment a second suit; while in the mean time the defendant might have brought and maintained an action for the malicious prosecution founded upon the first action. If such an improbable thing could be imagined, the law would not thereby be changed; but it must be remembered that plaintiff in the action for malicious prosecution must show affirmatively, not only that the action complained of had been terminated, but that it was commenced maliciously and without probable cause,—which could not well be done in the case suggested. The many cases cited in the American and English Encyclopedia of Law (vol. 19, p. 681) fully sustain the text, which correctly states the law on the subject, and is as follows: "It is not easy to lay down in a few words any general rule that would satisfactorily state when proceedings may be regarded as terminated for the purposes of an action of malicious prosecution. It may be briefly said, however, that a prosecution may be regarded as terminated when it has been disposed of in such a manner that it cannot be revived, so that the prosecutor, if he intends to proceed further, must institute proceedings *de novo*." We will refer briefly to a few of the many cases to the point (the italics are ours). In *Clark v. Cleveland*, 6 Hill, 344, the court, speaking through Cowen, J., say: "Nor can it be essentially necessary that there should be an adjudication of the magistrate, or, indeed, any judicial decision *upon the merits by any court*; . . . the technical prerequisite is only that the *particular prosecution* be disposed of in such a manner that it cannot be revived, and the prosecutor must be put *to a new one*; . . . the mere discontinuance of a civil suit, in any way, satisfies the rule." In *Apgar v. Woodston*, 43 N. J. L. 57, the court declare—we quote from the *syllabus*, which correctly states the decision—as follows: "The law requires only that the particular prosecution complained of shall have been terminated—and not that the liability of the plaintiff for prosecution for the same offense shall have been extinguished—before the action for malicious prosecution is brought. Consequently, the refusal of the grand jury to file an indictment, a *nolle prosequi*, or any proceeding by which the particular prosecution is dis-

posed of in such a manner that it cannot be revived, and that the prosecutor, if he intends to proceed further, must institute proceedings *de novo*, is a sufficient termination of the prosecution to enable the plaintiff to bring his action." In *Casebeer v. Diabole*, 13 Neb. 465, the court say: "The weight of authority, as well as of reason, is in favor of the position that the right of action is complete whenever the particular prosecution be disposed of in such manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one." In *Casebeer v. Rice*, 18 Neb. 203, a criminal charge had been made by defendants against plaintiff before a county judge, and "such proceedings were had as resulted in a dismissal of the cause and the discharge of the accused, by reason of the failure of the prosecution to give security for costs"; and this was held to be such a determination of the proceeding as to warrant the action for malicious prosecution, the court restating the language used in *Casebeer v. Diabole*. In *Lytton v. Baird*, 95 Ind. 349, the court held that an order quashing an indictment and discharging the defendant was a sufficient termination of the prosecution to warrant an action for malicious prosecution. In *Brown v. Randall*, 36 Conn. 56,¹ the court held as follows: "It is not necessary to sustain an action for malicious prosecution, that the defendant should be acquitted in the criminal proceeding. It is sufficient that the defendant was discharged without a trial, by a withdrawal or abandonment of the prosecution, not made at his request or by arrangement with him, if the jury should find on the whole evidence that there was want of probable cause." There are many other decisions to the same effect, but the foregoing are sufficient to cite here in support of a principle which we deem to be well founded in reason.

There are no decisions of this court to the contrary. What constitutes such a legal termination of a former suit or proceeding as will enable the defendant therein to maintain an action for malicious prosecution was not decided, or indeed touched, in *Berson v. Ewing*, 84 Cal. 89; *Acevado v. Orr*, 100 Cal. 293; or *Jones v. Jones*, 71 Cal. 89; cited on behalf of respondent. On the other hand, in *Holliday v. Holliday*, 123

Cal. 26, it was held, as to one count, that where the suit for malicious prosecution was founded on the arrest of plaintiff for alleged threat to commit an offense against property, the discharge of the accused on *habeas corpus* was a sufficient legal termination of the proceeding, and that, as to another count, a dismissal of the proceeding was sufficient; and the principle above stated seems to have been declared in *Dowling v. Polack*, 18 Cal. 626, which was a suit on an injunction bond, where the court, referring to the former action, say: "The suit was dismissed for want of prosecution, and with respect to the particular case, the judgment of dismissal had the same effect upon the rights of the parties as would have resulted from a judgment upon the merits."

It is averred in the complaint, in substance, that defendant solicited plaintiff to make application, and plaintiff did make application, for a policy on his life for one thousand dollars, for which he was to pay an annual premium of fifty-three dollars; that defendant afterward presented to him a policy in which the amount had been raised to two thousand dollars, and demanded a premium of \$103.40; that plaintiff refused to receive the policy or to pay the \$103.40; that afterward defendant brought suit against plaintiff in a justice's court in Santa Rosa Township, county of Sonoma, to recover said last-named sum of money, and that after plaintiff had appeared in said action the defendant (plaintiff there) dismissed it; that afterwards defendant brought another similar action in said justice's court; that plaintiff appeared to defend, and that on the day fixed for hearing the cause defendant failed to appear and the action was dismissed; that afterwards defendant brought a third similar action in the justice's court of the city and county of San Francisco, that the plaintiff again appeared, and attended court on the day fixed for trial, and that before that time defendant had dismissed the action. These averments—under the views above expressed—state a sufficient legal ending of the suits; and as to the dismissals, the averments are beyond question sustained by the evidence.

Defendant moved for a nonsuit, upon the grounds that the plaintiff had not succeeded in showing that a certain alleged agent, one Sturtevant, was the agent of defendant, and had failed to prove that the former suits were brought maliciously and without probable cause. Of course, if we could say that

the nonsuit should have been granted on any one of these grounds, the nonsuit would be sustained, no matter on what ground it was granted; but we cannot say that there was no evidence sustaining plaintiff's contentions as to the matters mentioned in said grounds for nonsuit. The court below did not pass on these matters, and expressly said that as to the main issue there was a "conflict of evidence."

There are a number of rulings of the court below which were excepted to by appellant; and as there may be another trial, it is perhaps necessary to notice a few of them. The court on motion of respondent struck out, as irrelevant, immaterial, and redundant matter, nearly one half of the complaint; and we think that in so doing the court erred. We do not deem it necessary to quote here the parts stricken out, which occupied nearly two and a half pages of the printed transcript. Some parts of the matter stricken out may possibly be redundant and irrelevant, but not the whole of it. It states some facts touching the origin and causes of the suits complained of which were proper and necessary to be stated; and the parts stricken out left the complaint disrupted and incomplete and without grammatical connection.

The third suit complained of was brought in the name of W. Rigby, Jr., to whom the alleged cause of action had been assigned by respondent merely "for the purpose of collection." Rigby having testified that the suit was dismissed, was asked by plaintiff "at whose request the suit was dismissed," and whether he had "orders to dismiss the suit, and, if so, from whom," and some other similar questions; and objections to the questions were sustained. The objections should have been overruled. Plaintiff had the right to inquire why the suit was dismissed, and whether it was done by order of the respondent, who, apparently, had control of it. If respondent procured the dismissal of the suit, no just reason being shown therefor, that fact was some evidence tending to prove want of probable cause and malice.

The original transactions out of which the litigation arose were between appellant and J. B. Sturtevant, and a question in the case was whether Sturtevant was the agent of respondent; and as evidence to this issue appellant offered a notice published by respondent while the last suit was pending, in a

public newspaper, which stated that "J. B. Sturtevant, who for the past seven months has been acting as agent for the Union Mutual Life Insurance Company in Sonoma County, is no longer in any way connected with the company"; and no objection to the evidence was sustained. This ruling was erroneous; the notice was certainly some evidence tending to show that Sturtevant was respondent's agent when the transactions involved here took place.

We think, also, that it was error to rule out a letter written December 5, 1898, by appellant's attorney to the respondent, the receipt of which was acknowledged by the latter. This letter was written and received before the commencement of the third suit, and informed plaintiff therein of what had occurred, and of appellant's claim that Sturtevant had raised the policy, etc. This letter was admissible as evidence; expressly showing that respondent had knowledge of the alleged act of Sturtevant as its agent, and the alleged fraud as to raising the policy, and was put on inquiry as to the real facts.

There are no other alleged errors necessary to be noticed.

The judgment appealed from is reversed.

Angellotti, J., Shaw, J., Van Dyke, J., Lorigan, J., Henshaw, J., and Beatty, C. J., concurred.

[Crim. No. 1024. In Bank.—January 13, 1904.]

THE PEOPLE, Respondent, v. RICHARD MANOOGIAN,
Appellant.

CRIMINAL LAW—MURDER—INSANITY—EVIDENCE—OBSERVATION OF WITNESSES.—Upon a prosecution for murder, where the defense was insanity, and it appeared that the defendant more than one month prior to the homicide had received a severe injury to his head, and there was evidence tending to show a concussion of the brain and a derangement of his mental faculties, it was error in such case to refuse to allow witnesses not intimate acquaintances within the meaning of subdivision 10 of section 1870 of the Code of Civil Procedure to testify to their observation of his acts and conduct at various times between the time of such injury and the time of the

homicide, and to his appearance at those times as being rational or irrational, or acting rationally or irrationally.

- 1D.—OPINION OF "INTIMATE ACQUAINTANCE"—DISCRETION OF COURT.—The question whether a witness is such an "intimate acquaintance" as to be allowed to give his opinion on the general question of sanity or insanity is from its nature peculiarly addressed to the discretion of the trial court, and the appellate court will not interpose, unless there is a clear abuse of discretion.
- 1D.—INSTRUCTION—CAUTION AGAINST COUNTERFEIT OF INSANITY.—An instruction taken *verbatim* from a decision of this court, and designed to caution the jury against being imposed upon by an "ingenious counterfeit of insanity," though it would be better omitted, will not be held prejudicially erroneous.
- 1D.—REFUSAL OF PROPER INSTRUCTION—MENTAL DELUSION.—Under the circumstances shown by the record a requested instruction upon the subject of insanity or mental delusion as to a particular matter which is not erroneous should have been given.
- 1D.—SELF-DEFENSE—IRRELEVANT MATTER—EVIDENCE—REFUSAL OF INSTRUCTION.—Where there was no question or evidence of self-defense, any error in excluding evidence as to the position of the hands of the deceased at the time of the homicide which had no relevance except upon that question was without prejudice; and it was proper to refuse a requested instruction upon the law of self-defense.

APPEAL from a judgment of the Superior Court of Fresno County. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

Frank Kauke, and W. D. Tupper, for Appellant.

U. S. Webb, Attorney-General, and J. C. Daly, Deputy Attorney-General, for Respondent.

ANGELLOTTI, J.—The defendant having been convicted of murder in the first degree, and adjudged to suffer imprisonment for life, appeals from the judgment and from the order denying his motion for a new trial.

The defense was insanity, the homicide being admitted, and the principal exceptions urged are based upon certain rulings made in relation to the admissibility of testimony offered by defendant to sustain that defense.

The homicide occurred on the evening of July 4, 1902. It appeared that during the month of May, 1902, defendant re-

ceived a severe injury by being knocked down, his head striking the concrete pavement, and there was evidence tending to show a concussion of his brain resulting therefrom, and a derangement of his mental faculties existing from that time to and including the time of the homicide. The prosecution made practically no attempt to rebut the evidence introduced in this behalf on the part of defendant. This much is said for the purpose of indicating that the defense was not entirely without merit, and for the purpose of showing the importance to the defendant, on whom, under the rule in this state, the burden rested to show that at the time of the homicide his mental faculties were so deranged as to render him incapable of distinguishing between right and wrong in relation to the act with which he was charged, of having all competent testimony offered by him bearing upon that defense admitted for the consideration of the jury.

Evidence as to the acts and conduct of defendant between the time of his injury, May 25, 1902, and the date of the homicide, July 4, 1902, was received on behalf of defendant, on the issue of insanity. Such evidence was, of course, admissible as bearing upon the question of his mental condition at the time of the homicide. (*Estate of Toomes*, 54 Cal. 509, 516;¹ *People v. Lee Fook*, 85 Cal. 300.) In this connection, various witnesses who had seen and conversed on various occasions with the defendant during that period of time were asked as to his appearance on those occasions with reference to his being rational or irrational, or acting rationally or irrationally. The witness, Isakoolian, who testified that he had known defendant for one year, was "pretty well acquainted with him during that time," and had seen him many times between the time he was hurt and the date of the homicide, was asked, "Well, now, what was his appearance at those times when he talked with you, with reference to his being or acting as men ordinarily do in their right minds, or otherwise?" The objection of the prosecution thereto on the ground that the witness had not shown a sufficient knowledge of defendant's acts to give an opinion as to his sanity was sustained. The witness Eguinian, who testified that he had been "quite well acquainted" with defendant for two years

¹ 35 Am. Rep. 83.

preceding the trial (October, 1902), that he had seen him frequently from the time he was hurt until July 4, 1902, and that he had noticed something different in his actions and demeanor after he was "hurt," was asked, "Now, just state to the jury how he would act, what peculiar ways he had, if any, after he got hurt." He answered, "Well, he was acting peculiar; *all his answers kind of not reasonable answers, and he was irrational; he was brooding over that trouble all the day, all the time.*" On motion of the prosecution the court struck out all that portion of the answer that we have italicized, leaving the question practically unanswered. The witness was further asked, "Now, at the various times that you saw the defendant and talked with him, or observed him, noticed his conversation or his actions after that injury, what can you say as to the appearance of the defendant at those times with reference to his being or acting rational or irrational?" The objection of the prosecution to this question on the ground that the witness was not qualified to give an opinion and not competent to testify was sustained. Neither of these witnesses was allowed to testify as to the appearance of the defendant in the respect suggested by the questions noted, and exceptions were duly taken to the various rulings of the trial court.

These rulings were apparently based upon the theory that the witnesses were not "intimate acquaintances" of the defendant, within the meaning of that term as used in subdivision 10 of section 1870 of the Code of Civil Procedure, and that their opinions respecting his mental sanity were therefore not admissible. The questions noted, however, did not call for the opinion of the witnesses as to the mental sanity of the defendant, but for the result of their observations at the various times they came in contact with him, as to his appearance in the respects suggested. The distinction is a clear one, and has been pointed out in many decisions of this court. In *People v. Lavelle*, 71 Cal. 351, it was held that the trial court did not err in allowing a witness for the prosecution to testify as to the appearance of the defendant at the time of his arrest, with reference to his being rational or irrational, the question asked in that regard being almost precisely the question asked the witness Eguinian as to the appearance of defendant, and the objection urged being that the witness

was not competent under subdivision 10 of section 1870 of the Code of Civil Procedure. This court there said that the evidence sought to be elicited was not the opinion of the witness as to the mental sanity of the defendant, based on acquaintance with him, but was rather as to a fact,—viz., his appearance at the time,—and that the evidence was admissible. The court said in that case: "The appearance of a person at a given time is one thing; the opinion of a witness as to the mental condition of that person, based on an acquaintance with him, is quite another." This ruling was followed in *Holland v. Zollner*, 102 Cal. 633, 636, where the question asked the witness was the same as that asked in *People v. Lavelle*, 71 Cal. 351. The force of the opinion is somewhat weakened by the language used by the court in denying a rehearing, where it is said that conceding the question to have been erroneous, the error was not of sufficient importance to warrant a reversal. In the *Estate of Wax*, 106 Cal. 343, 349, however, a substantially similar question put to one not an intimate acquaintance was held to be a relevant, material, and proper question, on the authority of *People v. Lavelle*, 71 Cal. 351, and *Holland v. Zollner*, 102 Cal. 633. In *People v. McCarthy*, 115 Cal. 255, 260, a capital case, the jailer who received the defendant at the county jail on the day of his arrest, was permitted to testify that defendant appeared "rational" at that time, and this court, in Bank, held that under the rule laid down in the authorities cited, the evidence was unobjectionable. In *People v. Arrighini*, 122 Cal. 121, 123, the prosecution was allowed to ask certain witnesses as to the appearance and manner of the defendant shortly after the homicide. This court, in approving the ruling of the trial court, distinguished the case from *Estate of Carpenter*, 94 Cal. 406, relied on by the learned attorney-general, saying that in the last-named case the questions did not call for a description of the manner or conduct of the persons concerning whom the inquiry was being made, nor whether he acted rationally or irrationally at any particular time. The court further said, speaking through Mr. Justice Temple, who wrote the opinion in the *Estate of Carpenter*, 94 Cal. 406: "In *People v. McCarthy*, 115 Cal. 255, the court held that it was proper to ask a witness whether the defendant acted rationally or appeared 'rational' at a particular time. So I think any witness may testify to

the demeanor of the defendant, whether he was intoxicated, appeared to be excited, was angry, or timid. . . . A witness may state whether the person was . . . melancholy, morose, peevish, irritable, or the opposite. And no doubt other mental habits may be testified to; such as whether he was incoherent, forgetful, or *irrational*."

The reasons underlying the conclusion in the cases cited are well stated in *Holland v. Zollner*, 102 Cal. 633. Certain questions are of such a nature that it is impossible for a witness to convey to a jury an adequate conception of the ultimate fact except by announcing the result of his observation. This is particularly true in regard to the qualities suggested by Mr. Justice Temple in the portion of his opinion in *People v. Arrighini*, quoted above. As was said in *Holland v. Zollner*, 102 Cal. 633, "To say that a man acts *rational* or *irrational*, is but to describe an outward manifestation drawn from observed facts. It is the last analysis, the ultimate fact, deduced from evidentiary facts coming under observation, but so transitory and evanescent as to be like drunkenness, easy of detection and difficult of explanation. Such conduct is not so much a matter of judgment as of observation."

As was said of the person whose sanity was in question in that case, so here no one will doubt but the facts in relation to the conduct of defendant were admissible in evidence, and that could the witnesses have explained every look, gesture, expression, and motion, it would have been competent to do so. All that the doctrine asserted in the cases cited seeks to do is in such a case, "by reason of the impossibility of giving form to all these varied manifestations, to permit the witness from necessity to produce the result of the manifestation as a whole." The right of cross-examination affords the person against whom such testimony is given full opportunity to show whether the conclusion of the witness is warranted by the facts.

As has been said before, questions like those under consideration do not call for the opinion of the witness as to the sanity of the person concerning whom the inquiry is being made. Such an opinion can properly be given only by an intimate acquaintance or an expert. They simply call for the result of the observation of the witness as to the manner or

conduct of such person at a certain time. That such person at a time shortly before the homicide appeared to be rational or irrational in conduct or conversation, is a fact which the jury are entitled to consider in determining the ultimate question as to whether or not he was insane at the time of the homicide.

The rulings of the trial court excluding this testimony were in conflict with the authorities hereinbefore cited, and, in our opinion, erroneous. We cannot say that defendant was not injured thereby.

The two witnesses already named, and one other, were asked as to their opinion as to defendant's sanity, and the objection of the prosecution that they had not been shown to be intimate acquaintances of defendant was sustained and the testimony excluded. This court has many times said that the question as to whether one has been shown to be an intimate acquaintance, and therefore qualified to express an opinion as to the sanity of a person, is from its nature peculiarly one that is addressed to the discretion of the trial court, and that the appellate court will not interpose unless an abuse of that discretion is clearly apparent. (*Wheelock v. Godfrey*, 100 Cal. 578, 584, and cases there cited; *People v. McCarthy*, 115 Cal. 256.) While the evidence as to the extent of acquaintance of these witnesses was such that this court would have held that the trial court was warranted in allowing them to give their opinion as to defendant's sanity, the reasons for such opinion being also given, as required by the statute, we cannot say that there was any abuse of discretion in holding that they were not intimate acquaintances.

Complaint is also made of a portion of an instruction given by the court upon the subject of insanity. This portion was taken *verbatim* from *People v. McCarthy*, 115 Cal. 265, and was designed to caution the jury against being imposed upon by an "ingenious counterfeit of insanity." It has been given in several cases, and while this court has frequently said that it would be better if this instruction were omitted altogether, it has also been said that as it has been given so often in the past and approved by this court, that it will not now be held prejudicially erroneous. (*People v. Meth-ever*, 132 Cal. 330; *People v. McCarthy*, 115 Cal. 256.)

We see no error in defendant's requested instruction No. 26, upon the subject of insanity or mental delusion as to some particular matter, or regarding a particular person, and are of the opinion that under the circumstances shown by the record, it should have been given. It is claimed that the court erred in sustaining the objections to certain questions asked on cross-examination of Julia Johnson, a witness for the people, as to whether or not she had, either at the coroner's inquest, or on the preliminary examination, said anything at all as to the position of the hands of the deceased at the time of the homicide, and concerning which she did testify at the trial on her direct examination. If it be conceded that the ruling was erroneous, the error was without prejudice. The testimony was material only upon the question of self-defense, and there was no testimony tending to show that the homicide was committed in self-defense.

Certain instructions requested by the defendant upon the law of self-defense were properly refused, for there was no evidence in the case to warrant the giving of the same.

None of the other points made calls for notice.

The judgment and order denying a new trial are reversed and the cause remanded.

Shaw, J., McFarland, J., Lorigan, J., Henshaw, J., Van Dyke, J., and Beatty, C. J., concurred.

[S. F. No. 2366. Department Two.—January 14, 1904.]

JOHN P. SILVA, Respondent, v. THOMAS BAIR, Appellant.

ACTION FOR GOODS SOLD—BILL OF PARTICULARS—SERVICE AFTER STATUTORY TIME—EVIDENCE—DISCRETION.—In an action for goods sold, where the defendant demanded a bill of particulars, which was furnished after the lapse of the statutory period, but was served more than a month before the trial, where no objection was made to its form, or completeness, but only that it was filed too late, the defendant has not an absolute right to exclude evidence for the plaintiff, but the allowance thereof was within the discretion of the court.

- ID.—REQUESTED INSTRUCTION—INCORRECT RULE FOR DAMAGES.**—A requested instruction for the defendant, stating rules for estimating damages which were neither pertinent nor correct, was properly refused.
- ID.—INSTRUCTION—SALE—COUNTERCLAIM.**—Where the defendant set up two counterclaims against plaintiff, an instruction that if the jury found that the transaction between the plaintiff and defendant was a sale of goods from plaintiff to defendant, they should find a verdict against defendant for their value, less the amount of any counterclaim in his favor, is not objectionable.
- ID.—GROWING CROP—SURRENDER OF POSSESSION—SALE.**—An instruction to the effect that a tenant who surrenders the leased premises surrenders his right to a growing crop of beets to the landlord, in the absence of an agreement on the part of the landlord to pay for the same, is not objectionable.
- ID.—COUNTERCLAIM—DAMAGES FOR ABANDONMENT OF LEASE—NEW LEASE FOR YEARS—EVIDENCE.**—Under a counterclaim in such action for damages for the abandonment by plaintiff of a lease from the defendant where it appeared that a new lease for a long term of years had been made to other parties, the true measure of damages is the difference in the rental value of the premises; and defendant is not entitled to offer evidence of profitable and unprofitable months, and to show that the new lease was made at the beginning of an unprofitable season.
- ID.—COUNTERCLAIM NOT RECOVERABLE—CONSENT TO RESCISSION OF LEASE—SURRENDER TO NEW LESSEES.**—The defendant was not entitled to recover any damages under such counterclaim where it appeared that the lease was rescinded by the consent of the plaintiff and defendant, and possession was surrendered by plaintiff to new lessees, to whom the defendant had leased the premises upon different terms and for a different period prior to such surrender.

APPEAL from a judgment of the Superior Court of Humboldt County. G. W. Hunter, Judge.

The main facts are stated in the opinion of the court.

The instruction as to growing crops related to a growing crop of beets, which the plaintiff claimed was included in his sale to the defendant. The substance of it is embodied in the *syllabus*.

Ernest Sevier, and Denver Sevier, for Appellant.

Gregor & Connick, for Respondent.

LORIGAN, J.—Plaintiff, on May 10, 1900, entered into the possession of a dairy ranch in Humboldt County, belonging to defendant, under an agreement to lease the same, with certain personal property thereon, for a term of five years, at a rental of \$166.66 per month. The lease was prepared, but was not executed by either party. In October, following his entry on the premises, plaintiff became dissatisfied with the lease, and so announced to defendant, and it was agreed between them, that if the plaintiff could find some one to take the lease off his hands, defendant would let such person have it. Thereafter, plaintiff brought prospective lessees to defendant, to whom, about said month of October, defendant leased the premises for a period of ten years, upon different terms from those upon which plaintiff held it. Plaintiff thereupon surrendered possession of the premises to said lessees. At the time of such surrender plaintiff claims that defendant purchased from him certain hay, beets, hogs, and calves, which were on the premises, and it is to recover for the reasonable value thereof that this action is brought.

Defendant, in addition to a denial that he ever purchased the property, interposed two counterclaims. No point is made under the first, so it will be unnecessary to consider it. Under the second he claimed damages in the sum of five hundred dollars for the neglect and failure of the defendant to sign the lease or comply with its terms, and for an alleged abandonment of the premises.

The cause was tried before a jury, and a verdict rendered in favor of plaintiff. Defendant appeals from the judgment entered thereon, on a bill of exceptions.

No point is made as to the sufficiency of the evidence to sustain the judgment, the points urged for a reversal being that the court erred in admitting and rejecting evidence, and likewise erred in some of its instructions to the jury.

The allegations of the complaint were general—that the plaintiff had sold goods, wares, and merchandise to the defendant of the reasonable value of \$1,299, for which defendant agreed to pay whatever they were reasonably worth.

Defendant, before trial, and on February 6, 1901, served a written demand on plaintiff for a bill of particulars, under section 454 of the Code of Civil Procedure, and no bill having

been furnished, made another demand on the 19th of the same month. On March 4th, thereafter, plaintiff delivered the bill of particulars demanded.

On the trial defendant objected to the introduction of any evidence upon said account, on the ground that the bill of particulars had not been furnished within five days after demand, as provided by the section. The objection was overruled, and the evidence of the account permitted. The appellant claims this was error.

The bill of particulars, however, was served a little over a month before the cause came on for trial. It seems to have been as full and complete as defendant wished it. No objection was made at, or before, the trial that it was too general or defective. The only objection was, that it was not delivered within the statutory time. This, however, did not give the defendant an absolute right to have the evidence offered rejected at the trial. It was within the discretion of the court to determine whether, under the circumstances, the penalty of the statute should be enforced, and the evidence excluded. That discretion seems to have been exercised in harmony with the decision of this court in *McCarthy v. Mt. Tecate L. W. Co.*, 110 Cal. 692, and we think properly so. In that case the court says: "If the defendant receives the copy long enough before the trial to enable him to examine it and prepare his defense, so far as he is concerned the statute has fulfilled its usefulness. It would be to the last degree oppressive to hold that the plaintiff must lose his cause of action because, though he had furnished the copy of his account more than forty days before the trial, he had served it upon the sixth instead of the fifth day after demand."

The next error assigned is, that the court improperly refused to allow defendant to introduce certain evidence under his second counterclaim. The proffered evidence tended to show which were the most profitable months for dairying, and was offered upon the theory that defendant had a right to prove that the premises were abandoned by plaintiff at the close of the profitable season, and that defendant, being compelled to rent them at the beginning of the unprofitable season, suffered a detriment; that the rental value of the premises in October, when plaintiff abandoned them, was a great deal less than when he took possession of them in the previous May.

There is no doubt but that defendant had a right to show such damage, but proof of the profitable or unprofitable months of the dairying season was not the proper way to do so. Nor was he in any manner precluded from introducing legitimate evidence to that end. When this evidence was offered, it was an undisputed fact in the case that defendant had, before plaintiff left the premises, leased them to others at a stipulated rent per month for a long term of years. The court held in passing on the objection to the testimony offered by the defendant on this point, that the true measure of damages would be the difference in the rental value of the premises; the difference between the rent agreed to be paid by plaintiff and the rent which was agreed to be paid by the tenants to whom the premises had been subsequently rented, if it were less. In so holding, the court announced the correct rule.

Aside from this, however, we do not think the defendant was entitled to any damages under any rule. His claim for them was based upon the theory that the plaintiff had repudiated the lease and abandoned the premises before the end of the term. The evidence clearly shows, however, that plaintiff surrendered his rights under the lease and possession of the property without objection from, and by express consent of the defendant. In this particular the defendant himself testified: "When Mr. Silva (plaintiff) complained to me about the place, I told him if he could find anybody that would take it off his hands, I would let them have it . . . I told Mr. Silva he could turn the ranch over to the Swiss boys (the persons to whom defendant did lease it) if he wanted to."

This is made more certain, if additional certainty were necessary, by the fact that before plaintiff had actually left the premises, defendant arranged to lease and did lease them, to others, on different terms and for a different period than contained in the lease to plaintiff.

Under these circumstances defendant would not, under any theory, be entitled to damages for breach of the terms of the lease which he agreed should be rescinded, and which was, in fact, rescinded.

Appellant complains of the refusal of the court to give two instructions asked for by him. They were properly refused.

They assume to state rules for estimating damages in favor of defendant which were neither pertinent nor correct.

Some of the instructions which were given are challenged as being argumentative, and trenching on the province of the jury. Our attention is not particularly called to their alleged argumentative character, and we cannot discover that there was any invasion of the province of the jury by the court. The instruction to the jury that if they found that the transaction between plaintiff and defendant operated as a sale of the hay, etc., to defendant, they should find a verdict against defendant for their value, less the amount of any counterclaim in his favor, is open to no objection. Neither is the instruction which was given concerning growing crops.

We do not perceive that any of the objections urged by appellant call for a reversal of the judgment, and it is therefore affirmed.

McFarland, J., and Henshaw, J., concurred.

[Crim. No. 1010. Department Two.—January 14, 1904.]

THE PEOPLE, Respondent, v. W. S. STRATTON, Appellant.

CRIMINAL LAW—INCEST—SUFFICIENCY OF INFORMATION.—An information for incest, charging that the defendant did willfully, unlawfully, and feloniously have sexual intercourse with a certain female child named, she being then and there the daughter of the defendant, fully apprised the defendant of the charge he was called upon to meet, and is sufficient.

ID.—EVIDENCE OF DAUGHTER.—FORCED SEXUAL INTERCOURSE.—Evidence of the daughter with whom the sexual intercourse was had by the defendant was admissible to prove frequent and repeated acts of sexual intercourse forced upon her by her father.

ID.—CROSS-EXAMINATION—INTERCOURSE WITH OTHER PERSONS.—A question asked upon cross-examination of the daughter, whether she had had sexual intercourse with other persons, was properly disallowed. Such proof would not tend to mitigate the offense.

ID.—TESTIMONY OF PHYSICIAN—CONDITION OF DAUGHTER—CORROBORATION OF HER TESTIMONY—REBUTTAL.—The testimony of a phys-

cian, received subsequently to the daughter's testimony, that her sexual organs were in the condition of those of a married woman, was competent and admissible, without regard to its weight, as tending to corroborate the daughter's testimony. It would then have been competent for defendant to have recalled the daughter, and to have shown by her or other competent means that she had permitted other persons to have sexual intercourse with her, in disproof of the fact that the condition of her sexual organs was caused by her father.

ID.—INSTRUCTION—ABSENCE OF CONSENT TO INCEST—CRIME NOT CHANGED BY FORCE—RAPE—CRIMINAL INTENT OF DEFENDANT.—It was proper to instruct the jury that "the consent of both parties is not essential to the crime of incest," and that "if the party charged have sexual intercourse with a female within the degree of consanguinity within which marriage is prohibited, he is guilty of the crime of incest, whether the intercourse was with or without the consent of such female." Where both the circumstances of force and consanguinity are present, it is not less incest because the element of rape is added; and the guilt of the defendant of the crime charged is measured by his knowledge and intent, and not by the knowledge and intent of any other person.

ID.—PROSECUTRIX, WHEN AN ACCOMPLICE—PRESENCE OR ABSENCE OF CONSENT—QUESTION FOR JURY.—If a prosecutrix, being of the legal age of consent, consents to the sexual intercourse, her testimony, like that of any accomplice, if not corroborated, is insufficient to convict; but if she is the victim of force, fraud, or undue influence, so that she does not willfully and willingly join in the incestuous act, she cannot be regarded as an accomplice. In this case the instructions fairly left the matter open to the determination of the jury.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial, and from an order denying a motion in arrest of judgment. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

F. H. Thompson, W. H. Shinn, and C. L. Shinn, for Appellant.

U. S. Webb, Attorney-General, and J. C. Daly, Deputy Attorney-General, for Respondent.

HENSHAW, J.—The appellant was charged on information, tried and convicted of the crime of incest, and appeals

from the judgment, from the order denying him a new trial, and from the order denying his motion in arrest of judgment.

1. The information charged that the defendant "did willfully, unlawfully, and feloniously have sexual intercourse with Nina E. Stratton, a female child, she, the said Nina E. Stratton, being then and there the daughter of the said W. S. Stratton," etc. It is said that the charge of felonious "sexual intercourse" is not within the purview of our statute, which declares (Pen. Code, sec. 285): "Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, . . . who commit fornication or adultery, . . . are punishable," etc. Adultery is the sexual intercourse of a married person with a person other than the offender's husband or wife. Fornication is distinguished from adultery by the fact that the guilty person is not married. To each and both offenses sexual intercourse is essential, and the charge in the information that the defendant willfully, unlawfully, and feloniously had sexual intercourse with his daughter fully apprised the defendant of the charge which he was called upon to meet. In *People v. Cease*, 80 Mich. 576, the information charged the defendant with the crime of fornication committed with one Elizabeth Cease, his daughter. It was proved that the defendant at the time was a married man, and it was urged that the information was fatally defective in not charging that he committed adultery. But the court said: "The gist of the offense was the act of sexual intercourse with his own daughter. He could not have been prejudiced by the averment that the act which constituted the crime was fornication instead of adultery."

2. The daughter with whom the incest was charged was the first witness. She was permitted to testify to frequent and repeated acts of sexual intercourse forced upon her by her father. The evidence was admissible. (*Lefforge v. State*, 129 Ind. 551; *State v. Markins*, 95 Ind. 464;¹ *State v. Bridgman*, 49 Vt. 202;² *Thayer v. Thayer*, 101 Mass. 111;³ *People v. Cease*, 80 Mich. 576; Wharton on Criminal Evidence, 9th ed., sec. 35.)

3. Upon cross-examination she was asked if she had not

¹ 48 Am. Rep. 733.

² 100 Am. Dec. 110, and note.

³ 24 Am. Rep. 124.

had sexual intercourse with other persons besides the defendant in the case. The people's objection to the question was sustained. The ruling was proper. The admission of the evidence would in no way have tended to disprove the charge. Her reputation, and indeed her character for chastity and virtue, were not material, and, as is said in *State v. Winnenham*, 124 Mo. 423, "Even that she was a prostitute would not have excused or mitigated his offense." Subsequent to the testimony of the daughter, the state called Dr. Norman Bridge, a physician, who testified as to the daughter's sexual organs, that they were in the condition of those of a married woman. This testimony, without regard to its weight, was competent, relevant, and material, in tending to corroborate the daughter's statement as to the frequent acts of intercourse to which she had been subjected. If, after the introduction of this evidence upon the part of the physician, the defense had recalled the daughter, and had undertaken to show by her, or by any other appropriate means, that she had permitted others to have sexual intercourse with her, the evidence then would have been admissible in disproof of the fact sought to be shown, that the condition of her sexual organs was caused by her father, but no such offer or attempt was made.

4. The most serious question in the case is found in the evidence to the effect that the daughter submitted to her father's passion under duress and fear of death or great bodily injury, taken with the instructions of the court given as follows: "The court instructs you that the consent of both parties is not essential to the crime of incest. If the party charged have sexual intercourse with a female related to him within the degree of consanguinity within which marriage is prohibited, he is guilty of the crime of incest, whether the intercourse was with or without the consent of such female." Incest is defined by our code as follows: "Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the state prison not exceeding ten years." (Pen. Code, sec. 285.) Upon this it is urged and argued that the crime of incest cannot be committed without the mutual consent of the parties, and that where, as here, the act is shown to have been accom-

plished under circumstances amounting to the rape of the female, the crime is not incest, but rape. In support of this view there is authority of great weight and dignity. Incest was not known to the common law, and being, therefore, a statutory crime, its definition will be found to be as various as the statutes themselves. But in many states where no substantial distinction can be discerned between their laws defining the offense and our own, the decisions fully support appellant's contention. The supreme court of Oregon, in a careful and learned opinion, reviews many of the cases, and reaches the conclusion which it expresses as follows: "We think the decided weight of authority is, that, under a statute like ours, the crime of rape by forcible ravishment and incest cannot be committed by the same act, but that of incest requires the concurring assent of both parties." (*State v. Jarvis*, 20 Or. 437.¹) In *De Groat v. People*, 39 Mich. 124, the learned Justice Cooley, speaking for the court, said: "Fornication, when the element of near relationship makes it incest, may be an offense equally detestable and heinous, but it still lacks the distinguishing characteristics of rape. The one is accomplished by the impelling will of one person, and the other by the concurrent of assent of two." The reasoning by which this conclusion is reached in all of the cases which so hold can be stated in the language of the supreme court of Oregon, in the case above cited, as follows: "It will be noticed that the language of the statute is 'with each other,' which necessarily implies a concurrent act and the consent of both parties. If one of the parties is compelled by force to submit to the act, there can be no consent of such party, and the act cannot be committed 'with each other' as declared by the statute."

But this reasoning does not commend itself. It interprets the law as making mutuality of agreement and joint consent of the essence of the crime. This is done by judicial construction, and not by the express declaration of the law. The gravamen of the crime of incest, as of rape, is the unlawful carnal knowledge. In rape it is unlawful because accomplished by unlawful means. In incest it is unlawful, without regard to the means, because of consanguinity or affinity. Where both the circumstances of force and consanguinity are present, the object of the statute being to prohibit by punish-

¹ 23 Am. St. Rep. 141.

ment such sexual intercourse, it is not less incest because the element of rape is added, and it is not less rape because perpetrated upon a relative. In this, as in every offense, the guilt of the defendant is measured by his act and intent, and not by the act and intent of any other person. That such has been the view of this court is evidenced by *People v. Kaiser*, 119 Cal. 456, where the defendant was indicted for the crime of incest, alleged to have been committed upon his daughter, a girl under thirteen years of age. As intercourse with a female child incapable in law of giving consent is declared to be rape, it was argued against the indictment that the offense charged was rape. But this court said: "Assuming that the facts stated in the indictment in this case were sufficient to constitute the crime of rape, the daughter then being under the age of consent, still, under section 285 of the Penal Code, they clearly constituted the crime of incest, and the defendant was therefore properly put upon trial for that offense." In further support of this view may be cited Bishop on Statutory Crimes, sec. 660; Wharton on Criminal Law, sec. 1751; *State v. Ellis*, 74 Mo. 385;¹ *Mercer v. State*, 17 Tex. App. 452; *People v. Barnes*, 2 Idaho, 161; *Smith v. State*, 108 Ala. 1;² *State v. Chambers*, 87 Iowa, 1;³ *State v. Ellis*, 11 Mo. App. 588; *Porath v. State*, 90 Wis. 527.⁴

If the prosecutrix, being of the legal age of consent, consents to the incestuous intercourse, unquestionably she is *particeps criminis*, and her testimony, like that of any other accomplice, uncorroborated, is insufficient to uphold a conviction. (*Schoenfeldt v. State*, 30 Tex. App. 695.) But if, upon the other hand, she is the victim of force, or fraud, or undue influence, or is too young to be able to give legal assent, so that she does not willfully and willingly join in the incestuous act, she cannot be regarded as an accomplice. (*Porath v. State*, 90 Wis. 527.⁴) In this case the instructions fairly left this matter open to the determination of the jury.

The judgment and orders appealed from are affirmed.

McFarland, J., and Lorigan, J., concurred.

¹ 41 Am. Rep. 321.

² 54 Am. St. Rep. 140.

³ 43 Am. St. Rep. 349.

⁴ 43 Am. St. Rep. 954.

[S. F. No. 2736. Department Two.—January 14, 1904.]

ALEC FRIES, a Minor, by his Guardian ad Litem, etc., Respondent, v. AMERICAN LEAD PENCIL COMPANY, Appellant.

MASTER AND SERVANT—ACTION BY MINOR—ERRONEOUS INSTRUCTIONS—CREDIBILITY OF TESTIMONY.—In an action by a minor child to recover damages for injuries sustained while in the employ of the defendant, an instruction that the jury are to judge of the credibility of the testimony introduced before them "by the appearance of the witnesses who have appeared on the witness-stand, and their interest as it may appear in the case," is an erroneous and injurious departure from the plain and explicit language of the law as embodied in sections 1847 and 2061 of the Code of Civil Procedure.

ID.—FAILURE TO INSTRUCT CHILD AS TO DANGER—MEASURE OF DAMAGES—FEELINGS OF JURY—INJURY PROXIMATELY CAUSED.—An instruction to the jury that if they believe from the evidence that the defendant failed to instruct the child as to the danger surrounding the work where he was employed, and that by reason of that failure the child was injured, then it would be their duty to give the child such an amount of damages as they "feel he is entitled to, not exceeding the amount prayed for in the complaint," is prejudicially erroneous, as substituting their emotional feelings of sympathy for the injured child, instead of the measure of damages prescribed by section 3333 of the Civil Code, as the amount which will compensate for the injury proximately caused thereby.

ID.—INTELLIGENCE OF CHILD—KNOWLEDGE OF DANGER—NEGLIGENCE OF DEFENDANT NOT CONTRIBUTING TO INJURY.—An instruction that if the jury should find from the evidence that the child was possessed of such intelligence that he knew of and was familiar with the danger surrounding the work, "and that the negligence of the defendant did not contribute to the injury," they should find for the defendant, is clearly erroneous. If the negligence of the defendant did not contribute to the injury, that alone was an end to the defendant's liability, without regard to the other considerations; and if the child knew and was familiar with the danger surrounding the work, no negligence could be imputed to the defendant for failure to instruct him as to the danger; and even if its negligence did contribute to the injury, nevertheless, if plaintiff was himself negligent, there can be no recovery.

ID.—NEGLIGENCE OF CHILD—ERROR IN REFUSING INSTRUCTION.—The court erred in refusing to give an instruction requested by the defendant, that "the law requires of a child suing for personal injury care and prudence equal to its capacity, and if you find from the evidence that the plaintiff in this action knew of the character

of the machine which caused his injury, and was aware of its dangerous character, and, knowing that fact, went to speak to the person operating said machine, and carelessly and negligently placed his hand on the machine, so that the injury to plaintiff occurred or was inflicted without fault on the part of the defendant, then your judgment will be in favor of the defendant."

APPEAL from a judgment of the Superior Court of Fresno County. J. R. Webb, Judge.

The facts are stated in the opinion of the court.

L. L. Cory, and C. H. Wilson, for Appellant.

It is only where the presumption of truth is overcome that the jury may judge of the weight and credibility of a witness. (Code Civ. Proc., sec. 1847; *People v. McLane*, 60 Cal. 412.) The court erred as to the measure of damages, and left it to the mere caprice or feelings of the jury, and its error is ground of reversal. (Civ. Code, secs. 3281, 3333; *Chidester v. Ditch Co.*, 53 Cal. 56; *Lombardi v. California etc. Co.*, 124 Cal. 311, 318; *Wales v. Pacific etc. Co.*, 130 Cal. 512, 523; *Lathrope v. Flood*, 135 Cal. 458, 460; *Erie Iron Works v. Barber*, 102 Pa. St. 156-163.) If plaintiff knew of and was familiar with the danger, the defendant is not responsible. (*Rodgers v. C. P. R. R. Co.*, 67 Cal. 608; *Baxter v. Roberts*, 44 Cal. 187-192;¹ *Studer v. Southern Pacific Co.*, 121 Cal. 400-409;² *McGraw v. Friend etc. Lumber Co.*, 120 Cal. 574-577; *Long v. Coronado R. R. Co.*, 96 Cal. 269-273; *Winans v. Sierra Lumber Co.*, 66 Cal. 61-65; *Maumus v. Champion*, 40 Cal. 121-125.) Defendant's third request was a correct statement of the law, and should have been given. (Bailey on Master's Liability, p. 114; *Buckley v. Silverberg*, 113 Cal. 673-682; *Peoria etc. Ry. Co. v. Pluckett*, 42 Ill. App. 642; *Chicago etc. R. Co. v. Lewis*, 109 Ill. 132.)

A. M. Drew, and Frank H. Short, for Respondent.

The plaintiff was entitled to a verdict on the evidence and an erroneous instruction does not prejudice the defendant. (*Green v. Ophir etc. Co.*, 45 Cal. 522; *Estate of Spencer*, 96 Cal. 454; *Hughes v. Wheeler*, 76 Cal. 230; *Aguirre v. Alex-*

ander, 58 Cal. 39; *In re Briswalter*, 72 Cal. 110; *Chalmers v. Chalmers*, 81 Cal. 81; *Estate of Burrell*, 77 Cal. 479.) The rule as to equal knowledge, or equal means of knowledge, of the danger does not apply where the child is of tender years and immature judgment. (*Rosenberg v. Durfee*, 87 Cal. 545; *Fiske v. Central Pacific R. R. Co.*, 72 Cal. 43¹; *Ingerman v. Moore*, 90 Cal. 410;² *Elledge v. Nevada etc. R. Co.*, 100 Cal. 282.³)

HENSHAW, J.—Plaintiff sued to recover damages for personal injuries sustained while in the employ of the defendant at its lead-pencil factory. He had been engaged to assist an older brother, who was sawing blocks of wood into little slabs from which the pencils are made. The brother was running a small circular saw, and it was the duty of the plaintiff to bring to the machine the blocks which were being sawed, and to gather up and tie into bundles the slabs that fell from the machine to the floor. Although plaintiff's employment was about the machine, he was not concerned with the machine nor with the saw. While engaged in his occupation his brother called to him to give him some directions, and as he stood near his brother to receive him his hand came in contact with the revolving saw and the accident occurred. The complaint charges the defendant with negligence in failing to instruct the plaintiff as to the dangers of his employment. The verdict was for plaintiff, and from the judgment defendant appeals.

1. The sole instruction which the court gave upon the credibility of witnesses, and the weight to be accorded to their testimony, was in the following language: "In this case you are the judges of the weight and credibility of the testimony that has been introduced before you, and you are to judge of that by the appearance of the witnesses who have appeared on the witness-stand, and their interest as it may appear in the case." This is a departure from the plain and explicit language of the law. The Code of Civil Procedure says (sec. 1847): "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting

¹ 1 Am. St. Rep. 22, and note.

² 33 Am. St. Rep. 293.

³ 25 Am. St. Rep. 133.

his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility." If, to meet the needs of a case, amplification of this rule is desirable, that also will be found in section 2061 of the same code. Here the jury were told that the weight and credibility of the testimony given by a witness was to be measured by the *appearance* of the witness as he was presented to them. Such is not only not the law, but it is in hostility to the law. The law says that the presumption of truth-telling may be repelled by the *manner* in which the witness testifies, together with the *character* of his testimony. The *appearance* of the witness upon the stand is but one of the elements going to make up the manner in which he testifies, and to limit the jury in weighing the evidence to the appearance alone, and to charge them, as here they were charged, that the appearance of the witness alone is to govern them, is an error as injurious as it is unnecessary.

2. The court further instructed the jury: "If in this case you believe from the evidence that the defendant in this case failed to instruct the child as to the danger surrounding the work where it was employed, and that by reason of that failure to instruct the child the child was injured, then it will be your duty to give the child such amount of damages as you feel it is entitled to, not exceeding the amount prayed for in the complaint." Here again is an unnecessary departure from the plain and express rule of law governing damages. Section 3333 of the Civil Code declares: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." The damages, therefore, permissible in such cases is the amount in money which will compensate for all injury *proximately* caused thereby. To say that the jury may award such damages as they *feel* the plaintiff is entitled to is the equivalent to telling them that they may give play to their emotions of sympathy for the injured child, emotions which, eminently proper in themselves, can have no just place in fixing an award for actual damages. Thus, the jury would be justified in departing from the express rule that the damages must be proximate, and would be permitted, under the

influence of their feelings, to make an award which, based upon sympathy, would contain elements of damage, both speculative and remote. (*Erie Iron Works v. Barber*, 102 Pa. St. 156.)

3. The court, after instructing the jury as to the responsibility of defendant for failing to inform the child of the dangers surrounding its employment, proceeded: "If, on the other hand, you should find from the evidence that the child was of that character and possessed of such intelligence that it knew of the danger itself, that it was familiar with the danger of such work, the danger surrounding it, and that the negligence of the defendant did not contribute to the injury, then it would be your duty to find for the defendant." This instruction is clearly erroneous. If the negligence of the defendant did not contribute to the injury, that was an end to the liability of the defendant, under all circumstances and without regard to other considerations. If, however, the child, as in the instruction premised, was of sufficient intelligence to be able to comprehend, and did in fact comprehend, the danger surrounding its occupation, then no negligence could be imputed to defendant if it did not give the employee instructions upon that point. The insertion of the clause "and that the negligence of the defendant did not contribute to the injury" imports a wholly erroneous conception into the instruction. Having regard to the tender years of a minor employee, its capacity for understanding, and its opportunities to understand, if, with knowledge of the dangers, it voluntarily encounters the risk, and through its own negligence is injured, the employer is not responsible, whether he has instructed the child as to those dangers or not. (*Rodgers v. Central Pac. R. R. Co.*, 67 Cal. 608; *Barter v. Roberts*, 44 Cal. 187;¹ *Bailey on Master's Liabilities for Injuries to Servant*, p. 114.) Moreover, even if the negligence of the defendant did "contribute to the injury," yet if plaintiff, having regard to his tender years and his capacity and opportunities for understanding, was himself negligent, there can

¹ 13 Am. Rep. 160.

be no recovery. (*Studer v. Southern Pac. Co.*, 121 Cal. 400;¹ *McGraw v. Friend & Terry Lumber Co.*, 120 Cal. 574.)

4. The defendant proposed the following instruction, the giving of which was refused: "You are further instructed that the law requires of a child suing for personal injury, care and prudence equal to its capacity, and if you find from the evidence that the plaintiff in this action knew of the character of the machine which caused his injury and was aware of its dangerous character, and, knowing that fact, went to speak to the person operating said machine, and carelessly and negligently placed his hand on the machine so that the injury to plaintiff occurred or was inflicted without fault on the part of the defendant, then your judgment will be in favor of the defendant." That this instruction is unimpeachable in point of law is not gainsaid. (Bailey on Master's Liability for Injuries to Servant, p. 114, notes and cases.) But it is answered by respondent that the matter of the instruction was fully covered by an instruction actually given. That instruction was the one discussed under subdivision 3 hereof, and not only did not cover the matter proposed, but was in itself erroneous and injurious.

For the foregoing reasons the judgment appealed from is reversed and the cause remanded.

Lorigan, J., and McFarland, J., concurred.

[S. F. No. 2773. Department One.—January 15, 1904.]

W. D. VALENTINE et al., Appellants, v. POLICE COURT OF CITY AND COUNTY OF SAN FRANCISCO, etc., Respondent.

MUNICIPAL ORDINANCE—VALIDITY—CONVICTION IN POLICE COURT—AFFIRMANCE UPON APPEAL—CERTIORARI.—The writ of *certiorari* will not lie to determine the validity of a municipal ordinance properly involved in an appeal taken to the superior court from a judgment of conviction of a violation thereof in the police court which has been affirmed upon said appeal. The writ only lies where there is

no remedy by appeal, and will not lie either where such remedy has been lost by laches or where a judgment has been affirmed upon appeal.

1D.—PROHIBITION—BENCH-WARRANT TO ENFORCE JUDGMENT AFFIRMED—MINISTERIAL ACT—JUDICIAL ACTS PERFORMED.—Prohibition cannot be resorted to where there is a plain, speedy, and adequate remedy by appeal; and where a judgment of conviction of an offense has been affirmed upon appeal, prohibition will not lie to prevent the ministerial act of a bench-warrant to enforce the judgment. The writ of prohibition is confined to preventive relief, and is not intended as a writ of review, nor to serve the purpose of a second appeal, nor to prevent judicial acts already done, nor to secure the annulment of proceedings already had.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. William P. Lawlor, Judge.

The facts are stated in the opinion.

George D. Collins, for Appellants.

Joseph F. Coffey, for Respondent.

GRAY, C.—A petition was filed in the court below for writs of *certiorari* and prohibition. On demurrer to this petition the defendant had judgment. Plaintiffs appeal from the judgment.

From the petition it appears that the plaintiffs were tried and convicted in the defendant court of the crime defined in order No. 1587 (secs. 1 and 34) of the board of supervisors of the city and county of San Francisco. The judgment was, that the defendants each pay a fine in a given sum, and that in default of payment they be imprisoned, etc. It further appears that after the conviction had in the police court, the case of the plaintiffs herein and defendants therein was appealed to the superior court, and the judgment was affirmed. Thereafter bench-warrants were issued by the police judge for the arrest and imprisonment of defendants therein to satisfy said judgments. The purpose of this action is to have it declared that the said judgments and bench-warrants are in excess of the jurisdiction of the police court, and that said judgments and warrants be annulled.

It is accordingly here urged that the ordinance upon which the prosecution was based was void for several different reasons, that the complaint filed in the police court did not state any offense, and that the judgments of the police court and the warrant based thereon are also void. All these questions were the proper subject of investigation and determination upon the appeal taken to the superior court. And it is not the purpose of the law that these same questions should be reinvestigated and redetermined by the supreme court or by any other court upon application for a writ of *certiorari* or prohibition, or upon an application for both of those writs. The writ of *certiorari* issues only in cases where there is no remedy by appeal. (Code Civ. Proc., sec. 1068; *White v. Superior Court*, 110 Cal. 54.) And this rule applies with equal force where the right of appeal has been lost by laches. (*Faut v. Mason*, 47 Cal. 7; *Bennett v. Wallace*, 43 Cal. 25.) It is equally clear that the rule continues to apply after the appeal has been heard and determined, as in this case, adversely to appellants. "The statute (Code Civ. Proc., sec. 1067) was intended to supply a remedy where none existed in the first instance." (*Bennett v. Wallace*, 43 Cal. 25.) It was never intended that it should be substituted for an appeal. (*Faut v. Mason*, 47 Cal. 7.)

It is also settled that prohibition cannot be resorted to where, as here, there is a plain, speedy, and adequate remedy by appeal. (*White v. Superior Court*, 110 Cal. 54.) But appellant contends that the law does not give an appeal from the order of the police court directing the issuance of the bench-warrants. Let this be granted for the sake of argument, and yet no theory is presented to us upon which the order for the bench-warrant or the bench-warrant itself can be held invalid without a review of the judgment and a determination that the latter is void. Unless we can review the case and determine that the judgment is invalid, we must proceed upon the theory that it is valid, and its validity being admitted, the bench-warrant is also valid. Indeed, the issuance of the bench-warrant follows of necessity upon the affirmation of the judgment upon an appeal, and no judicial function is thereby brought into exercise, but it is a mere ministerial act. The writ will not issue to restrain an act, unless it involves the exercise of judicial functions. (2 Bailey on

Jurisdiction, sec. 449; *Hull v. Superior Court*, 63 Cal. 179.) The case of *Terrill v. Superior Court*, 60 Pac. 38. 516. is cited to uphold the right to prohibition herein. In that case no judgment had been entered against the petitioner, and it was sought by prohibition to prevent the entry of a judgment,—it plainly appearing that the court had no power or jurisdiction to enter such judgment. The court held that the remedy by appeal, given by the statute, was not adequate, because it was not sufficiently speedy. In that case the hearing in this court was upon an original petition. The case before us is different from the *Terrill* case in several respects. The most material difference is, that here the judgment has already been entered, has been reviewed on appeal and affirmed by the court of last resort. The writ of prohibition is confined to preventive relief, and is not intended as a writ of review, nor is it contemplated by the law that it shall serve the purpose of a second appeal after a party has already availed himself of the only appeal given him under the statute.

The judgment here attacked has become a fixed judicial determination. This writ will not issue "to prevent judicial acts already done." (*Hull v. Superior Court*, 63 Cal. 179; 2 Bailey on Jurisdiction, secs. 480, 481.) "This writ is not the appropriate one to secure the annulment of proceedings already had." (*More v. Superior Court*, 64 Cal. 345.)

We advise that the judgment be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Shaw, J., Angellotti, J., Van Dyke, J.

Hearing in Bank denied.

[S. F. No. 2468. In Bank.—January 15, 1904.]

BEN LOMOND WINE COMPANY, Respondent, v.
CHARLES SLADKY, GEORGE R. EATON et al., De-
fendants; CHARLES SLADKY, Appellant.

UNLAWFUL DETAINER—ASSIGNMENT OF LEASE BY ASSIGNEE—POSSESSION DELIVERED BEFORE NOTICE TO QUIT.—An action for unlawful detainer will not lie against an assignee of a lease who had assigned the lease and delivered possession to another assignee before the service upon him of notice to quit.

ID.—BREACH OF COVENANTS—REMEDY BY ACTION.—The fact that the first assignee of the lease had been guilty of a breach of covenants of the lease prior to the assignment by him and delivery of the possession under it to another assignee does not render him liable in the summary action of unlawful detainer to damages therefor. In such case the only remedy for such breach is by an ordinary action.

ID.—SPECIAL VERDICT—ORDER GRANTING NEW TRIAL—INSUFFICIENCY OF EVIDENCE—LACK OF SPECIFICATIONS—ABSENCE OF GROUND AS TO APPELLANT.—Where the jury found a special verdict, that the appealing defendant had assigned his interest in the lease to a co-defendant prior to the service of notice to quit, and that the co-defendant had taken possession as assignee of the lease prior to such service, an order granting a new trial to the plaintiff as against the appellant cannot be sustained for insufficiency of the evidence to justify the special verdict, where there are no specifications thereof in the statement; and where there is no assignment of any error of law material to the special findings, and no other ground for granting the order as against the appellant appears in the record, the order will be reversed as to him.

APPEAL from an order of the Superior Court of Santa Cruz County granting a new trial. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Lester H. Jacobs, and Frohman & Jacobs, for Appellant.

Kierce & Gillogley, for Respondent.

Black & Leaming, for George R. Eaton, Co-Defendant.

ANGELLOTTI, J.—This is an appeal by defendant Charles Sladky from an order of the superior court granting the plaintiff's motion for a new trial. The action was in unlaw-

ful detainer, the complaint alleging that Sladky, as assignee of a leasehold interest in plaintiff's land, and defendant Eaton, claiming to have some rights under the lease, were unlawfully holding over and continuing in possession of said land after certain alleged violations of the covenants and conditions of said lease, and after notice in writing requiring them to quit and deliver up to plaintiff possession of the demised premises. Judgment for restitution and possession of said premises was asked, together with damages for the unlawful detainer, and also for the violation of the covenants of the lease.

Sladky and Eaton filed separate answers, Sladky alleging that prior to the service upon him of notice to quit he had regularly executed to Eaton an assignment of the lease and all of his rights thereunder, and had, prior to the service of such notice, delivered to said Eaton full possession of said premises, and that he had not thereafter been in possession of any part of said premises. The action was tried with a jury, which rendered a special verdict. The following special issues, with ten others relating to other matters, were submitted to the jury, viz.: 1. Had the defendant, Charles Sladky, assigned his interest in the lease mentioned in the complaint to defendant, George R. Eaton, prior to the service of the notice to quit on the defendants, Eaton and Sladky? 2. Had the defendant, George R. Eaton, taken possession of the premises referred to in the lease prior to the service on him of the notice to quit? To each of these queries the jury answered "Yes," and the record shows no evidence in conflict with these findings. The record shows that the notice to quit was served on Sladky and Eaton on the same day. Upon the other issues, the special verdict was also in favor of both Sladky and Eaton. Judgment in defendants' favor was thereon entered.

While plaintiff's notice of motion for a new trial specified as a ground therefor insufficiency of the evidence to justify the verdict in favor of defendants on any of the issues, there is not in the statement on motion for a new trial any specification of insufficiency of evidence to justify the finding of the jury upon either of the issues above set forth, or any such specification relating in any degree whatever to the subject-matter thereof. In such statement there is no assign-

ment of any error of law, in any way material to the proper determination of these issues, or the determination of any question relating to the possession at the time of the service of the notice to quit or thereafter.

Some question is made as to whether the order of the lower court granting a new trial excludes insufficiency of the evidence as one of the grounds, this question arising from the fact that the opinion signed by the judge in deciding the motion and filed, which purported to order a new trial, did state that he would not disturb the verdict on that ground, while the order entered in the minutes was general in terms. This question would appear to be settled by the decision of this court in *Newman v. Overland etc. Ry. Co.*, 132 Cal. 73, wherein it was held that where there is an order granting a new trial entered upon the minutes of the court, and also an opinion filed showing the reasons for the granting of the motion, and concluding with the words, "The motion for a new trial is granted," the order entered in the minutes is the only record of the court's action, and is to be measured by its terms, and not by the reasons which the court may give for it.

As insufficiency of the evidence was one of the grounds specified in the notice of motion for a new trial, we would be compelled to assume, in favor of the order appealed from, that the motion was granted upon that ground, if the statement discloses a case in which the superior court would have been authorized to grant the motion on such ground, as against the defendant Sladky. The superior court could not, however, properly grant the motion for a new trial upon the ground that the evidence was insufficient to justify the findings of the jury hereinbefore set forth as to the assignment by Sladky to Eaton, and the taking of possession of the premises by Eaton prior to the service of the notice to quit, for the statement contained no specification in relation thereto, and, so far as that matter was concerned, the statement could not be considered by the court. (Hayne on New Trial and Appeal, sec. 150; Code Civ. Proc., sec. 659, subd. 3.) The findings of the jury in that regard stand unchallenged, and, so far as Sladky is concerned, we have a case where an assignee of a leasehold interest, who has, as such assignee, been in possession of the demised premises, has prior to the service of any notice to

quit *assigned his interest to another, and delivered possession to such other*. In other words, at the time of service of such notice to quit, Sladky was not "continuing in possession" of the demised premises.

It would seem to require no argument to show that the summary proceedings provided, as the title to the chapter relating to them state, "for obtaining possession of real property in certain cases," will not lie against the mere assignee of a lease, who has again assigned and delivered possession to his assignee. We are, of course, speaking of an assignment and delivery of possession actually and in good faith made, for the pleadings and unchallenged findings of the jury and the absence from the statement of specifications relating to this matter permit no other assumption as to the character of the assignment and delivery of possession in this case. It is therefore unnecessary to determine what the situation would have been if, as is now contended by respondent, the assignment and delivery by Sladky to Eaton had been fraudulent, for that question is not presented by the record. It is also entirely immaterial, so far as Sladky is concerned, whether or not he had been guilty of a violation of covenants of the lease. He was not guilty of unlawful detainer in retaining possession of the premises after breach of covenants, if there was a breach, so long as notice requiring the surrender of possession of the premises was not served upon him (*Schnittger v. Ross*, 139 Cal. 656), and, the lease not forbidding an assignment, he certainly had the legal right to assign it and deliver possession of the premises to the assignee, at any time before service of the notice to quit. Having so done, and not thereafter being either a tenant or in possession of any part of the premises, he could not be guilty of an unlawful detainer, for one can be guilty of unlawful detainer only "when he continues in possession, in person or by subtenant," of the property, or some part thereof, after service upon him of the notice to surrender possession. Such is the express provision of our statute. Not being guilty of an unlawful detainer, he could not be liable for damages in the summary proceeding provided by statute therefor, for the only damages recoverable in such a proceeding are the damages caused by the un-

lawful detainer. (Code Civ. Proc., sec. 1174.) For such damages as may have been suffered by plaintiff by reason of any breach of the covenants of the lease by Sladky while he was a tenant under the lease and lawfully in possession of the premises thereunder, plaintiff must resort to the ordinary action, and cannot take advantage of the summary proceeding designed solely to enable him to speedily recover possession of the demised premises and put an end to the lease.

It is well settled that this proceeding can be resorted to only in the cases and by and against the parties mentioned in the statute. (*Martel v. Meehan*, 63 Cal. 47.)

The statute is so plain and unambiguous that it is unnecessary to cite authorities in support of the proposition that an assignee who has assigned the lease and delivered possession of the demised property to his assignee prior to the service of the notice to quit does not come within its terms. As was said in the early case of *Reed v. Grant*, 4 Cal. 176, "In such an action the 'holding over' is, in fact, the foundation of the action, and must necessarily be proved, like any other substantive fact. If this proof can be dispensed with, then any one may be called on to answer in like manner, for the wrongful holding over of premises, which he may at one time have been in possession of." (See, also, *Steinbach v. Krone*, 36 Cal. 309, 310.)

Under these circumstances it is immaterial whether or not the evidence was conflicting in regard to other matters. The uncontradicted evidence and the unattacked findings as to the assignment and delivery of possession of Sladky prior to the service of notice to quit conclude the case in his favor, so far as the question of sufficiency of evidence is concerned, and the trial court could not grant a new trial as to him on the ground of insufficiency of the evidence.

No other legal ground for the granting of a new trial as to Sladky appears in the record.

It is ordered that the order granting plaintiff's motion for a new trial be and the same is, so far as it affects the defendant Sladky, hereby reversed.

Shaw, J., Lorigan, J., Henshaw, J., Van Dyke, J., and Beatty, C. J., concurred.

[S. F. No. 3508. Department One.—January 15, 1904.]

In the Matter of the Estate of SAMUEL VANCE, Deceased.
BERTHA A. SMITH, Administratrix, etc., of Eliza A.
Vance, Deceased, Appellant, v. CLARA M. VANCE,
Administratrix, etc., of Samuel Vance, Deceased, Re-
spondent.

ESTATES OF DECEASED PERSONS—FINAL ACCOUNT—CONTEST—BURDEN OF PROOF.—Upon a contest of the final account of an administratrix, where the exceptions taken to the account are affirmative, the burden of proof is upon the contestant; and the administratrix in opening her case upon the account was not required to anticipate the evidence in support of the exceptions, nor to show that the affirmative allegations therein contained were not true; and the court properly refused to disallow the account for want of proof of the falsity of such allegations.

ID.—FRAUDULENT TRANSFER BY DECEDENT TO ADMINISTRATRIX PERSONALLY—ATTACK BY CREDITOR OF ESTATE—PLEADING.—Without deciding whether the right of an administratrix who received a gift from the decedent as his daughter can be assailed by one who claims to be a defrauded creditor of the estate of the decedent, upon the settlement of the final account of the administratrix, or whether it is the subject of an independent suit, it cannot be set aside as a fraudulent transfer in any case, without an appropriate pleading, in which the fraudulent intent is alleged as matter of fact, as being material to the right claimed to set it aside.

ID.—CONSTRUCTION OF PROVISIO—VOLUNTARY GIFT BY INSOLVENT—RULE OF EVIDENCE.—The proviso to section 3442 of the Civil Code, to the effect that any transfer made voluntarily, without a valuable consideration, while insolvent, is fraudulent and void as to existing creditors, is a rule of evidence, and not of pleading, and does not affect the rule that the fraudulent intent is a fact which must be alleged.

ID.—VALIDITY OF TRANSFER—LEGAL TITLE.—The transfer was valid between the parties, and if in fraud of creditors could not be considered as void in law in the absolute sense. It was effectual to transfer the legal title until there was some appropriate action by some court having jurisdiction declaring it fraudulent and void. It was not legally the property of the decedent at the time of his death.

ID.—TRUST FOR CONTESTING ESTATE—ENFORCEMENT.—The question whether the decedent at the time of the transfer to his daughter was holding the property in question in trust for the estate represented by the contestant, and whether the daughter is chargeable

with the same trust, cannot be determined upon a contest of the final account of the daughter as administratrix of the estate of her deceased father, but can only be determined in a personal action against the daughter to enforce the trust.

APPEAL from an order of the Superior Court of Fresno County settling the final account of an administratrix. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

George B. Graham, for Appellant.

L. L. Cory, and E. E. Shepard, for Respondent.

SHAW, J.—This is an appeal from the order settling the final account of Clara M. Vance, administratrix of the estate of Samuel L. Vance, deceased.

The final account of the estate of Samuel L. Vance, deceased, as filed in the court below, showed that the administratrix had received no assets belonging to the estate, and had expended something over one thousand dollars on account of the estate. At the time of the hearing, Bertha A. Smith, as administratrix of the estate of Eliza M. Vance, deceased, filed exceptions to the final account, claiming that the estate of Eliza M. Vance was interested as a creditor in the estate of Samuel L. Vance, and that the administratrix of the latter estate had received money to the amount of \$1,290.50 belonging to the estate of Samuel L. Vance, with which she had not charged herself in said account. The exceptions contained no statement of facts going to show that the money did actually belong to the estate of S. L. Vance, deceased. They are based on the bare allegations that the money had been in the possession of Clara M. Vance as administratrix ever since her appointment as administratrix, that it was still in her possession and control, and the conclusion that the said property was a part of the estate of Samuel L. Vance, deceased. Upon the hearing of the account and exceptions, the respondent introduced evidence to prove the disbursements as shown in the account, and the value of the services of the attorneys for which compensation was asked, and rested. Thereupon the appellant, Bertha A. Smith, moved

[S. F. No. 3508. Department One.—January 15, 1904.]

In the Matter of the Estate of SAMUEL VANCE, Deceased. BERTHA A. SMITH, Administratrix, etc., of Eliza A. Vance, Deceased, Appellant, v. CLARA M. VANCE, Administratrix, etc., of Samuel Vance, Deceased, Respondent.

ESTATES OF DECEASED PERSONS—FINAL ACCOUNT—CONTEST—BURDEN OF PROOF.—Upon a contest of the final account of an administratrix, where the exceptions taken to the account are affirmative, the burden of proof is upon the contestant; and the administratrix in opening her case upon the account was not required to anticipate the evidence in support of the exceptions, nor to show that the affirmative allegations therein contained were not true; and the court properly refused to disallow the account for want of proof of the falsity of such allegations.

ID.—FRAUDULENT TRANSFER BY DECEDENT TO ADMINISTRATRIX PERSONALLY—ATTACK BY CREDITOR OF ESTATE—PLEADING.—Without deciding whether the right of an administratrix who received a gift from the decedent as his daughter can be assailed by one who claims to be a defrauded creditor of the estate of the decedent, upon the settlement of the final account of the administratrix, or whether it is the subject of an independent suit, it cannot be set aside as a fraudulent transfer in any case, without an appropriate pleading, in which the fraudulent intent is alleged as matter of fact, as being material to the right claimed to set it aside.

ID.—CONSTRUCTION OF PROVISIO—VOLUNTARY GIFT BY INSOLVENT—RULE OF EVIDENCE.—The proviso to section 3442 of the Civil Code, to the effect that any transfer made voluntarily, without a valuable consideration, while insolvent, is fraudulent and void as to existing creditors, is a rule of evidence, and not of pleading, and does not affect the rule that the fraudulent intent is a fact which must be alleged.

ID.—VALIDITY OF TRANSFER—LEGAL TITLE.—The transfer was valid between the parties, and if in fraud of creditors could not be considered as void in law in the absolute sense. It was effectual to transfer the legal title until there was some appropriate action by some court having jurisdiction declaring it fraudulent and void. It was not legally the property of the decedent at the time of his death.

ID.—TRUST FOR CONTESTING ESTATE—ENFORCEMENT.—The question whether the decedent at the time of the transfer to his daughter was holding the property in question in trust for the estate represented by the contestant, and whether the daughter is chargeable

with the same trust, cannot be determined upon a contest of the final account of the daughter as administratrix of the estate of her deceased father, but can only be determined in a personal action against the daughter to enforce the trust.

APPEAL from an order of the Superior Court of Fresno County settling the final account of an administratrix. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

George B. Graham, for Appellant.

L. L. Cory, and E. E. Shepard, for Respondent.

SHAW, J.—This is an appeal from the order settling the final account of Clara M. Vance, administratrix of the estate of Samuel L. Vance, deceased.

The final account of the estate of Samuel L. Vance, deceased, as filed in the court below, showed that the administratrix had received no assets belonging to the estate, and had expended something over one thousand dollars on account of the estate. At the time of the hearing, Bertha A. Smith, as administratrix of the estate of Eliza M. Vance, deceased, filed exceptions to the final account, claiming that the estate of Eliza M. Vance was interested as a creditor in the estate of Samuel L. Vance, and that the administratrix of the latter estate had received money to the amount of \$1,290.50 belonging to the estate of Samuel L. Vance, with which she had not charged herself in said account. The exceptions contained no statement of facts going to show that the money did actually belong to the estate of S. L. Vance, deceased. They are based on the bare allegations that the money had been in the possession of Clara M. Vance as administratrix ever since her appointment as administratrix, that it was still in her possession and control, and the conclusion that the said property was a part of the estate of Samuel L. Vance, deceased. Upon the hearing of the account and exceptions, the respondent introduced evidence to prove the disbursements as shown in the account, and the value of the services of the attorneys for which compensation was asked, and rested. Thereupon the appellant, Bertha A. Smith, moved

the court to disallow the account, on the ground that there had been no proof of the falsity of the facts stated in the exceptions. The court overruled this motion. The hearing proceeded, evidence was given in behalf of the contestant, subject to exception and a motion to strike out, and after the evidence of the contestant was all given, the motion to strike out was granted, and thereupon an order was made settling the final account as presented, and disallowing the exceptions.

1. The court did not err in refusing to disallow the account upon the motion of the contestant at the close of the testimony introduced by the respondent. The allegations of the exceptions are affirmative, and, so far as they related to matters of fact or to the real objections of the contestant, constituted new and affirmative matter in opposition to the account, and it was therefore incumbent upon the contestant to introduce evidence in support of these allegations, and the respondent was not required at the opening of her case to anticipate the evidence in support of the exceptions, and show that the allegations in the exceptions were not true.

2. The claim of the contestant upon the merits as disclosed by the evidence offered was to the effect that, a few weeks prior to the death of Samuel L. Vance, he had made a gift of all his property to the present administratrix of his estate, Clara M. Vance, who was his daughter; that at that time he was indebted to the estate of Eliza M. Vance, now represented by the contestant, and that the gift to his daughter was made with intent to defraud creditors; that, for that reason, the transfer was fraudulent and void as against the estate of Eliza M. Vance; and that, consequently, the administratrix of the estate of Samuel L. Vance was properly chargeable in her account with the property thus received by her from the deceased, Samuel L. Vance, in his lifetime. The respondent in opposition to this claim insists that no such issue can be tried upon the settlement of an account; that where the administratrix claims title in herself to the property in dispute, such claim cannot be settled by proceedings in probate upon the settlement of an account, but must be made the subject of an independent suit, either at law or in equity, upon issues properly framed for the purpose of de-

termining the title, citing in favor of the proposition *Ex parte Casey*, 71 Cal. 269; *Estate of Haas*, 97 Cal. 232; *Stuparich Mfg. Co. v. Superior Court*, 123 Cal. 290; *Heydenfeldt v. Jacobs*, 107 Cal. 378; *Haverstick v. Trudel*, 51 Cal. 431; *Smith v. Westerfield*, 88 Cal. 378; *Curtis v. Schell*, 129 Cal. 208;¹ *Ex parte Hollis*, 59 Cal. 406. These cases generally involve the question whether upon the hearing of a proceeding in probate the rights of a third person not a party to the proceeding can be adjudicated. We do not find it necessary in the decision of this case to determine whether or not in a case where, as here, the third person who claims the interest in the property is in court in her capacity as administratrix of the estate of the deceased, to whom it is alleged the property belongs, such personal right of the administratrix can be determined upon the settlement of an account. Even if it be conceded that the superior court sitting in probate might be held to have such jurisdiction, yet it must be admitted, on the other hand, that no such inquiry can or should be entered upon either by the probate court or any other court, unless the necessary allegations of fact upon which the legal title to the property depends is made in some pleading filed in the action or proceeding. The contestant here, if she had brought an independent action to have the transfer from the father to the daughter set aside as fraudulent and void, must have alleged the facts of the transaction, and also the facts showing that the transfer was fraudulent, and particularly that it was made with the intent to defraud creditors. By the provisions of section 3442 of the Civil Code the question of fraudulent intent is one of fact, and not of law, and therefore it must be made the subject of an allegation in any pleading in which the question of intent is material to the right claimed. The proviso to that section to the effect that any transfer made voluntarily, without a valuable consideration, by the party while insolvent, is fraudulent and void as to existing creditors, is a rule of evidence, and not a pleading, and does not affect the rule that the intent is a fact which must be alleged. Therefore, it follows that there is no statement of facts contained in the exceptions sufficient to show that the transfer by Samuel L. Vance to his daughter was fraudulent and void as against creditors. The transfer was

¹ 79 Am. St. Rep. 107.

valid as between the parties, and it could not be considered as void in law in the absolute sense. It was effectual to transfer the legal title until there was some appropriate action by some court having jurisdiction declaring it fraudulent and void. It was not legally at the time of his death the property of Samuel L. Vance; therefore, the evidence offered by the contestant did not support the bare allegation (or rather the recital, for there is no direct allegation) that the property belonged to the estate of Samuel L. Vance, deceased.

3. There are some allegations in the exceptions and some evidence from which it might be inferred that Samuel L. Vance, at the time he made the transfer to his daughter, was holding in trust as executor of the estate of Eliza M. Vance, deceased, the sum of money in controversy here, and that the respondent here took the transfer under such circumstances that she would hold the property subject to the same trust. Whether this be true or not is a question which cannot be considered in this case. If she did so hold the property in trust, that question could only be determined in a personal action against her to enforce the trust.

The order appealed from is affirmed.

Angellotti, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[Crim. No. 946. Department One.—January 16, 1904.]

THE PEOPLE, Respondent, v. BERNARD WARD, Appellant.

CRIMINAL LAW—FELONY—JUDGMENT—AMENDMENT NUNC PRO TUNC—

POWER OF COURT.—The inherent right and power of a court to cause its record to be amended, in accordance with the facts, where the record made by the clerk is incorrect, exists in criminal as well as civil cases; and where a defective minute entry of a judgment for imprisonment in the state prison, rendered upon conviction of felony embezzlement, afforded sufficient evidence to justify an order *nunc pro tunc* correcting the defects therein, such order will be affirmed upon appeal therefrom.

APPEAL from an order of the Superior Court of the City and County of San Francisco amending the judgment. F. H. Dunne, Judge.

The facts are stated in the opinion of the court.

George D. Collins, for Appellant.

U. S. Webb, Attorney-General, and E. B. Power, Deputy Attorney-General, for Respondent.

ANGELLOTTI, J.—The defendant was convicted of embezzlement in the superior court of the city and county of San Francisco on November 14, 1899, and judgment was rendered by the court, Hon. F. H. Dunne, judge presiding, on December 2, 1899. Defendant appealed to this court from the judgment, the record on such appeal showing a judgment regular on its face, and on October 11, 1901, the judgment was affirmed. (134 Cal. 301.)

It was subsequently discovered that the only minute entry of a judgment in the superior court was the following, viz. :—

“Saturday, December 2, 1899.

“The People of the State of California v. Bernard Ward.—No. 12847.

“The district attorney with the defendant and his counsel F. McGowan, Esq., came into court, by the court of the information duly presented on the 11th day of April, 1899, by the district attorney of the city and county of San Francisco charging said defendant with the crime of felony to-wit: embezzlement of his arraign and plea of ‘Nt Gly’ as charged on said Information’; on the 29th day of April, 1899, of his trial and the verdict of the jury on the 14th day of November, 1899, Guilty as charged. The defendant show why judgment should not be against him through his counsel moved the court for a new trial upon all the statutory grounds on the 18th day of November, 1899, which motion was taken under advisement by the court, and now this day by the court ordered denied. And no sufficient cause being shown or to the court hereupon the court renders its.

“That Bernard Ward having been duly convicted in his court of the crime of felony, to-wit: embezzlement, It is there-

fore ordered, that the said Bernard Ward be punished by imprison in the state at Folsom for the term of seven (7) years.

"The defendant was then of the said city and county to be by him delivered into the custody of the proper officers of said state prison at Folsom, California."

The district attorney thereupon moved, on notice, for an order correcting said minute entry so as to make it conform to and be a correct record of the judgment, stating in his notice that the motion would be based on the minutes and records of the court, and the knowledge of Hon. Frank H. Dunne, the judge who rendered said judgment.

This motion came on for hearing before the court on November 19, 1901, Judge Dunne presiding.

The district attorney introduced in evidence the notice of motion, and the minute entry hereinbefore quoted was received in evidence by consent.

The court then stated that the minute entry was not a true record of the judgment, and that judgment had been rendered by said court on December 2, 1899, and that the judgment so rendered was correctly set forth in a proposed order, which was then shown to defendant. Defendant was then asked if he had any evidence to offer to show that the judgment alleged to have been rendered was not in fact rendered, and he offered no evidence.

The court then made an order reciting the rendition of judgment on December 2, 1899, the adjudging part of which judgment was as follows: "It was therefore ordered, adjudged, and decreed that the said Bernard Ward be punished by imprisonment in the state prison of the state of California at Folsom for the term of seven years," and reciting the failure of the clerk to enter said judgment, except as hereinbefore set forth, and declaring the judgment rendered to be the true judgment, and directing the entry thereof *nunc pro tunc* as of December 2, 1899.

The defendant appeals from this order.

The inherent right and power of a court to cause its acts and proceedings to be correctly set forth in its records, and, where the record made by its clerk does not correctly show the order or direction in fact made by the court, to cause the

record to be corrected in accordance with the facts, is not denied by the appellant. This matter is elaborately discussed, and the California authorities cited in the opinion of this court in *Kaufman v. Shain*, 111 Cal. 16.¹

There can be no doubt that the power exists in criminal cases as well as in civil cases, as is clearly recognized by the decisions rendered in the matter of settling this defendant's bill of exceptions on appeal from the order here assailed. (See *Ward v. Dunne*, 136 Cal. 19, and *People v. Ward*, 138 Cal. 684.)

It is also now well settled that the power of the court to make such corrections is not lost by mere lapse of time, and in this respect the rule as to the effect of the adjournment of the term has become obsolete. (*Kaufman v. Shain*, 111 Cal. 23,¹ and cases there cited; *Freeman on Judgments*, sec. 71; *Black on Judgments*, secs. 155, 157, 158, 162.)

Mr. Black says: "The power of courts to amend judgments after the close of the term extends to all omissions to enter the judgments pronounced by the court; and to clerical errors in the form of the entry, whether by introducing a fact which ought to appear on the record or by striking out a statement of a fact improperly produced, and when the record affords sufficient evidence." (*Black on Judgments*, sec. 158.)

It is contended that there was not upon the hearing of the motion in the trial court any showing that the judgment as entered originally in the minutes was not the judgment rendered, and that there was no showing other than the minutes containing the defective entry as to what judgment actually was rendered.

There may be some question as to the character of evidence competent to show an error in the recorded judgment and as to the right to resort to the recollection of the judge who rendered the judgment after such a lapse of time. It was said, however, in *Kaufman v. Shain*, 111 Cal. 16,¹ that the question as to whether the clerk has correctly recorded an order is to be determined by the court in which the motion is made, and that the evidence offered in support of the motion "must be satisfactory to the judge of that court." It was further intimated that in some cases the judge's own memory might be sufficient.

In that case the affidavit of the shorthand reporter was considered, together with the calendar and note-book kept by the judge. (See, also, *Morrison v. McCue*, 45 Cal. 118, 119.) These questions are, however, immaterial on this appeal, for it is universally established that if the record itself furnishes the means of correction the court may order the amendment without further proof. This is admitted by counsel for appellant. We are satisfied that the defective minute entry itself affords sufficient evidence to justify the court in making the order in question. It has never been held, as contended by appellant, that to justify such a correction there must be proof outside of and extrinsic to the contents of the entry sought to be corrected. In many cases it is doubtless true that the alleged defect is of such a nature that the contents of the entry do not afford satisfactory evidence of the mistake and of the order made or judgment rendered. In such cases, proof outside of and extrinsic to such entry is, of course, necessary, if the recollection of the judge cannot be invoked. The record entry may, on the other hand, be such as to afford to any reasonable mind satisfactory evidence not only of the mistake but also of what the order or judgment in reality was. If it does afford such satisfactory evidence, it is sufficient to justify the order of correction.

The minute entry in this case showed upon its face that it had been made with extreme and inexcusable carelessness, and that it was incomplete. The abbreviations and omissions were of such a nature as to practically demonstrate this. While there were many apparent omissions in the minute entry, the only one as to which it could be contended that there was any substantial uncertainty was that relating to the place of imprisonment.

Mr. Freeman says: "There are many cases in which it so clearly appears that the judgment as entered is not the sentence which the law ought to have pronounced upon the facts as established by the record, that the court acts upon the presumption that the error is a clerical misprision rather than a judicial blunder, and sets the judgment, or rather the judgment entry, right by an amendment *nunc pro tunc*." (Freeman on Judgments, sec. 70.) This rule is applicable in this case. The record here showed that the defendant had been

convicted of felony embezzlement, an offense punishable only by imprisonment in a state prison. No judgment other than one of imprisonment in a state prison could lawfully be pronounced. A judgment that he be simply imprisoned in the state, even though Folsom be designated as the particular locality of the state in which the imprisonment should be had, would be absurd. When we take into consideration the fact that one of our two state prisons is located at Folsom, and that the minute entry showed that there was to be a delivery "into the custody of the proper officers of *said* state prison at Folsom, California," it satisfactorily appears that the omission was due to the neglect of the clerk, and that the place of imprisonment designated by the court in rendering judgment was the state prison at Folsom.

The record was definite and certain to the effect that a judgment upon a conviction of felony embezzlement was rendered against the defendant, and that the term of imprisonment imposed was seven years. It afforded sufficient evidence to sustain the finding of the trial court that the place of imprisonment designated by the court was the state prison at Folsom, and that the judgment rendered was in all respects as stated in the order of amendment. To hold otherwise would be to surrender substance to form, common sense to the most extreme technicality.

The order is affirmed.

Shaw, J., and Van Dyke, J., concurred.

[Crim. No. 1013. In Bank.—January 16, 1904.]

THE PEOPLE, Respondent, v. JOSEPH TESHARA, Appellant.

CRIMINAL LAW—EVIDENCE—CROSS-EXAMINATION OF DEFENDANT.—A defendant in a criminal case who has by his testimony in chief contradicted the evidence for the prosecution may be cross-examined with reference to all facts or denials necessarily implied from his testimony in chief, as well as with respect to the facts expressly

stated by him in such testimony; and the cross-examination is not limited by the exact period of time fixed by the testimony in chief, but may extend to the whole transaction of which he gives a part, and which occurred in immediate connection with the part which he relates, shortly before or after, and in which he must have been concerned, and of which he may be reasonably supposed to have had knowledge.

APPEAL from a judgment of the Superior Court of Santa Cruz County and from an order denying a new trial. W. M. Conley, Judge, presiding.

The facts are stated in the opinion of the court.

Carl E. Lindsay, for Appellant.

U. S. Webb, Attorney-General, and C. N. Post, Assistant Attorney-General, for Respondent.

SHAW, J.—The defendant appeals from a judgment of conviction of murder in the second degree, and from an order denying his motion for a new trial. The error assigned is, that upon the trial the court allowed the prosecution in the cross-examination of the defendant to ask questions not relating to matter testified to by him upon the examination in chief.

There was no evidence for the prosecution showing the circumstances of the homicide other than that contained in the dying declaration of the deceased, Garrett D. Loucks. He was a saloon-keeper in Santa Cruz. According to this declaration, as illustrated by a map of the premises introduced in evidence, the defendant and one Manuel Amaya came into his saloon on the evening of February 10, 1900, and Teshara asked Loucks to play a game of pedro. They sat down in the cardroom (which was immediately behind the front room, or the bar-room, as it is called) and played two games. Teshara then asked Amaya to play, but Amaya said he did not want to do so, and about that time Patrick Morrissey came into the saloon, and ask Teshara to take a drink with him. The two each drank, Morrissey left, and Loucks and Teshara played two more games and part of another, whereupon Amaya, who was sitting on a lounge behind Loucks, struck him over the head with something several times, and ran for the front door, the

deceased following him, and Teshara following behind the deceased. When the deceased had reached the middle of the front room, Amaya shot him in the breast, and Teshara, being still behind Loucks, called out: "Kill him, kill him, don't let him get away." Amaya then fired another shot, hitting Loucks in the abdomen, and he fell. Shortly afterwards Loucks was found in the saloon badly wounded. Two days afterwards he died of the wounds. There was other testimony to the effect that Teshara and Amaya had been seen together on that evening shortly before the homicide, going toward the saloon. Morrissey also testified that he entered the saloon and treated Teshara to a drink, as stated in the dying declaration.

In his examination in chief the defendant testified that he had lived in Santa Cruz the greater part of his life; that he knew Patrick Morrissey, and remembered that Morrissey came into Louck's saloon on the night of February 10, 1900; that he had a drink with Morrissey on that occasion; that Morrissey left the saloon; that two or three minutes afterwards the defendant himself left the saloon and went to bed, leaving Loucks standing behind the bar in the saloon, alive, uninjured, and well, and that he did not again see Loucks that night. It will be observed that the defendant gave no testimony whatever relating to any occurrence, in the saloon or elsewhere, before the entrance of Morrissey; and that his relation of the facts occurring at and subsequent to Morrissey's entrance correspond exactly with Morrissey's statements during his presence, and differed entirely from the statements in the dying declaration as to what took place after Morrissey's departure.

Upon cross-examination the district attorney began by asking questions relating to occurrences in the saloon prior to Morrissey's entrance, to which objections were sustained by the court. The district attorney then said: "I think I ought to have a chance to show how he arrived at the saloon and who was with him if any one," to which the court said, "I think you will." A number of questions were then asked, in answer to which the defendant testified that Patrick Morrissey was in the saloon for a while; that after the defendant arrived at the saloon he went into the cardroom and found deceased seated at a table engaged in a game of solitaire; that they greeted each other, and thereupon the deceased proposed a game of

pedro with him. Many of the questions were objected to, but two questions were asked which elicited the fact that Manuel Amaya was in the saloon with the defendant and went into the cardroom with him, and to these questions there was no objection, nor was there any motion to strike out the answers. The statement as to what took place after he went into the cardroom was given in answer to the question: "What did you do after you got into the cardroom?" During the answer to this question one or two minor questions were interjected, but the witness continued with his answer until he made the statement that the deceased had proposed a game of pedro. Thereupon the court interrupted, saying: "Strike out the last answer; ruling is reversed and the objection is sustained. You will have to confine yourself to matters brought out on direct examination, the cross-examination must be confined to those matters and nothing else." Thereafter the cross-examination proceeded at considerable length, during all of which the district attorney was rigidly limited to facts occurring at and after the time when Morrissey entered the saloon.

Many of the questions relating to occurrences when Morrissey was there, and afterwards were vigorously objected to by the defendant's counsel. We think there is manifestly no error in these questions. The defendant had attempted in his direct examination to state what occurred from the time Morrissey entered until he himself left the saloon, and his statements as to facts occurring after Morrissey left impliedly contradicted the dying declaration of the deceased. It was proper cross-examination for the prosecution to ask him concerning other matters that occurred during the time as to which he testified, and which he did not mention in his direct examination.

With respect to the facts elicited at the beginning of the cross-examination relating to matters occurring before the entrance of Morrissey, we are of the opinion that whatever there was of the evidence thus elicited that was injurious to the defendant was cured by the voluntary testimony of the defendant in the subsequent cross-examination. As to the evidence showing that a card game was proposed by Loucks, we do not perceive that it was harmful or material. In his cross-examination relating to the occurrences subsequent to Morrissey's entrance, the defendant testified that he was playing

the last hand in a card-game at a table in the cardroom at the time Morrissey entered. These facts being elicited, it was not particularly important to inquire how long he had previously been engaged in the game, nor who proposed it. With regard to the presence of Amaya in the room, the defendant in his subsequent examination volunteered the statement that Amaya was there prior to the entrance of Morrissey. The district attorney had asked him some questions relating to the position of the defendant at the time Morrissey entered the room. Thereupon this question was asked: "Q. Where was Manuel Amaya at this time?" An objection to this question was properly overruled, as the time referred to was the time of Morrissey's entrance. The answer was: "Manuel Amaya was seated in a chair on the opposite side of the table." The witness was then asked: "This has reference to the immediate time that Morrissey came in?" to which he answered: "Why, Amaya was not there at all at the time Patrick Morrissey came in; there was no one there outside of Mr. Loucks and I; Mr. Morrissey made the third party." Neither the court nor counsel could foresee that the witness would misunderstand the question with reference to the whereabouts of Amaya. There was no motion to strike out the answer, and hence it remained as part of the testimony, and fully disclosed to the jury the fact that Manuel Amaya had been in the saloon prior to the entrance of Patrick Morrissey. All this testimony, of course, to some extent corroborated the dying declaration, but in so far as it was objected to we do not think it transcended the limits of cross-examination.

We have discussed the case so far upon the theory that any inquiry as to the occurrences in the saloon prior to Morrissey's entrance would not have been proper cross-examination. We are of the opinion, however, that the limits of proper cross-examination were not exceeded, even if the objections made should be considered as properly applying to all the questions with respect to such prior occurrences which were answered by the defendant, and even if the facts disclosed were material.

The statement of the deceased showed that the defendant and Amaya had entered the saloon together that evening and had remained there until after Morrissey departed; that Amaya, in the presence of Teshara, then struck and shot the

deceased; that Teshara encouraged Amaya to kill the deceased, whereupon Amaya shot again, and that when Teshara left the saloon the deceased had received his death-wound and had fallen to the floor. Teshara's direct testimony showed, in effect, that he did nothing in the saloon except to drink with Morrissey, and that he went away a few minutes afterward, leaving Loucks in the saloon alone, alive, well, and uninjured, standing behind the bar. It was equivalent to a denial of all the facts stated by Loucks as occurring after the departure of Morrissey, and therefore to a denial of any part in, or knowledge of, the killing, and of any participation with Amaya in the offense. A defendant cannot, by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution, thus indirectly denying the testimony against him, but without testifying expressly with relation to the same facts, limit the cross-examination to the precise facts concerning which he testifies. He can be cross-examined with respect to facts or denials which are necessarily implied from the testimony in chief, as well as with respect to facts which he expressly states. And he cannot, by beginning his narrative at a particular moment of the occurrence, limit the cross-examination to the same exact period. The cross-examination may extend to the whole transaction, of which he gives a part, and which occurred in immediate connection with the part he relates, shortly before or after, and in which he must have been concerned, or of which he may be reasonably supposed to have had knowledge. Therefore it was proper to ask him with respect to things which occurred in the saloon that evening after he entered and in his presence or hearing, and also concerning the persons who were with him at and after the time of his arrival. In substance and effect he had denied that Amaya was in the saloon at the time he left. It was proper to show, if possible, on his cross-examination, that Amaya and he came there in company and remained there together for a considerable part of the evening preceding the time when he chose to begin his narrative of events. It would tend to some extent to show that Amaya was there after Morrissey departed, and to contradict to that extent his implied denial of Amaya's presence there at all after that time. Also, it was proper to prove the previous games of cards to impeach his implied denial that any games were played immediately preceding his own

departure. Both Loucks and Morrissey said that Morrissey when he came in had interrupted the game of cards at which Loucks and defendant were engaged. If the games had been going on for some time before the interruption, it would furnish some slight ground for an inference that the play was resumed after Morrissey left.

No other questions are presented upon the record.

It is therefore ordered that the judgment and order appealed from be affirmed.

Angellotti, J., Lorigan, J., Henshaw, J., Van Dyke, J., and Beatty, C. J., concurred.

[S. F. No. 3553. Department One.—January 16, 1904.]

In the Matter of the Estate of HENRY LEVY, Deceased, PAULINE LEVY, Appellant, v. MYER JACOBS, and HERMAN MORRIS, Executors, etc., et al., Respondents.

ESTATES OF DECEASED PERSONS—APPEAL FROM ORDER OF SALE—GENERAL DEMURRER TO PETITION—WAIVER OF SPECIAL OBJECTIONS.—

Upon appeal from an order of sale of real property of a deceased person, taken by the surviving wife, who is also a devisee and legatee under the will of the decedent, the appellant occupies no more advantageous position, so far as the insufficiency of the petition is concerned, by having filed a general demurrer thereto, than if she had not presented such demurrer, the question being in either case whether the petition is substantially defective in any of the requirements of section 1537 of the Code of Civil Procedure. Where no ground of special demurrer or special objection was urged to the petition in the lower court, all special objections thereto which might have been successfully urged in the court below are to be deemed waived.

Id.—VALUES OF REALTY—REFERENCE TO SCHEDULE—APPRAISED VALUES.

—Where the petition for the order of sale refers to a schedule for the values and condition of the real estate, and the values there set forth are the appraised values thereof, this, in the absence of special objection, is a sufficient statement of the present values.

Id.—CONDITION OF REALTY—TENABLE SPECIAL OBJECTION—EVIDENCE.—

Where the only description of the condition of two city lots is,

that each of the two parcels was improved, that one had been set apart as a homestead for the period of administration, and that the other was encumbered by a mortgage for ten thousand dollars, if timely special objection had been urged to the petition for insufficiency of such statement of condition, it should have been sustained. But, in the absence of such special objection, the statement of condition of the real property is not to be deemed fatally defective. It was sufficient to authorize the court to receive evidence of the condition of the lots, and to determine, in view of such evidence, whether it would authorize a sale.

IA.—OMISSION AS TO FAMILY ALLOWANCE—PURPOSE OF SALE—PRESUMPTION UPON APPEAL.—The omission of the petition to state the amount due or to become due on the family allowance does not render the petition insufficient in the absence of special objection; and where the sale was not ordered to pay the family allowance, it will not be presumed upon appeal that anything was due or to become due thereon.

ID.—OMISSION TO NAME HEIRS AS SUCH.—The omission of the petition to state that the persons named therein as devisees and legatees were also the only heirs of deceased, as appears from the order of sale, was not fatal to the order.

ID.—PETITION BY EXECUTORS—OFFICIAL CHARACTER.—A petition by executors for an order of sale in the matter of the estate, presented to the court in which the estate was pending, and by which they were appointed, if appointed at all, is not objectionable upon the ground that it did not sufficiently show their official character.

APPEAL from an order of the Superior Court of the City and County of San Francisco directing the sale of real estate of a deceased person. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

W. T. Kearney, for Appellant.

Arthur J. Dannenbaum, for Executors, Respondents.

T. E. Pawlicki, and Otto Irving Wise, for Heirs and Devisees, Respondents.

Hugo D. Newhouse, for Edward Calame, Assignee of Louis B. Levy, Respondent.

ANGELLOTTI, J.—This is an appeal by Pauline Levy, the surviving wife of deceased, who is also a devisee and legatee under his will, from an order of the superior court

made in the administration of his estate, authorizing the executors of his will to sell a parcel of real property belonging to his estate.

It is claimed by appellant that the petition of the executors for the order of sale, and upon which the order is based, did not substantially comply with the requirements of section 1537 of the Code of Civil Procedure, and that the court erred in making an order of sale thereon. Her general demurrer to the petition on this ground was overruled in the court below.

It is contended that the petition was defective in that it contained no sufficient statement of the condition or value of the real estate of the deceased, and no statement at all as to the names of his heirs or as to family allowance. There was no statement in the petition as to want of knowledge on the part of the executors as to any of these matters.

The only statements in the petition as to the condition and value of the real estate of decedent were as follows, viz.: The petition alleged that the full description of the real estate "and the condition and value of the respective portions and lots of said real estate are set forth in the schedule marked 'D' hereto annexed, and made a part of this petition." Schedule "D" contained descriptions, by metes and bounds, of two city lots in the city and county of San Francisco. The first description ends & follows, viz.: "*With the improvements thereon.* The appraised value of said lot *and improvements*, according to the inventory, is \$17,500.00. This property has been set aside to the widow as a homestead until the final distribution of the estate; however, both the executors and the other heirs are at present perfecting an appeal to the supreme court, appealing from the order of this court setting aside this property to the widow as a homestead for this period."

The second description commences as follows, viz.: "Other property of the estate consists of all that land *with the improvements thereon*, situated," etc., and ends as follows, viz.: "This lot *and the improvements thereon* according to the inventory is appraised at \$19,700.00. Upon this property there is a mortgage of ten thousand (\$10,000.00) dollars, bearing interest at the rate of 6 per cent per annum, held by the

Hibernia Savings and Loan Society of the city and county of San Francisco."

The petition did not purport to state the names of the heirs, but did contain a statement as to who were the devisees and legatees. The order of sale contains a statement of the names of the heirs, and it appears that they were all legatees or devisees and named in the petition as such.

The petition contains no statement whatever as to any amount that is due or will become due upon the family allowance, nor any statement indicating that anything was so due or to become due thereon, except that it did state that there was an insufficiency of personal estate to pay, among other things, "the allowance of the family." The payment of family allowance was not, however, one of the purposes for which the sale was ordered by the court to be made. The order of sale authorized the sale of the parcel mortgaged to the Hibernia Savings and Loan Society. Section 1537 of the Code of Civil Procedure requires the applicant for an order for the sale of real property to "present a verified petition," setting forth among other things "the amount due upon the family allowance or that will be due after the same has been in force for one year; . . . a general description of all the real property of which the decedent died seised, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof; . . . the names of the legatees and devisees, if any, and the heirs of the deceased, so far as known to the petitioner," and further provides that "If any of the matters herein enumerated cannot be ascertained, it must be so stated in the petition; but a failure to set forth facts hereinbefore enumerated will not invalidate the subsequent proceedings if the defect be supplied by the proofs at the hearing and the general facts showing that such sale is necessary, . . . be stated in the decree."

So far as the question of insufficiency of the petition is concerned, appellant occupies no more advantageous position by reason of the filing of her general demurrer than she would have occupied had she presented no demurrer and simply appealed from the order of sale. In either event the question for determination is as to whether or not the petition is substantially defective in any of the requirements of section 1537 of the Code of Civil Procedure. A substantial com-

pliance with the provisions of that section is of course essential to the validity of the order on direct appeal. (*In re Byrne*, 112 Cal. 176; *Estate of Cook*, 137 Cal. 184.) As was held, however, in *Estate of Heydenfeldt*, 127 Cal. 456, which was an appeal from an order of sale, "The point that a statement is insufficient which is easily understood as an attempted statement of a particular fact, and is merely shadowed by some uncertainty or want of fullness or aptness of expression, can be reached only by a special demurrer or objection in the court below." (See, also, *Estate of Devincenzi*, 119 Cal. 498, 500; *Silverman v. Gundelfinger*, 82 Cal. 548.) There can be no good reason why parties who have been duly notified of the proceeding for a sale should not be required to make objections of such a nature in the lower court or be deemed to have waived them, just as in the ordinary civil action they are deemed to have waived them, unless they make them by special demurrer. This is especially true of such statements as do not go to the real merits of the question before the court,— viz., the question as to the necessity for a sale of realty of the deceased. If the commissioner's opinion in *Estate of Cook*, 137 Cal. 184, which was a case where there was no attempt in the petition to state the value of the land, is at all at variance with these views, it may properly be said that such opinion is signed by only two justices of this court, and Mr. Justice McFarland concurred solely on the ground that the court in its decree did not find the value of the property. Tested by the rule stated in *Estate of Heydenfeldt*, 127 Cal. 456, we are of the opinion that, in the absence of special demurrer or objection, the petition was sufficient.

The schedules attached to the petition constituted a part thereof. In the body of the petition it was stated that the values and condition of the realty are set forth in schedule "D," and the only values there set forth are the appraised values. This was a sufficient statement as to present value in the absence of special objection. As was said in *Silverman v. Gundelfinger*, 82 Cal. 548, such an averment in the body of the petition may fairly be taken as an averment that the amount named in the schedule is the present value of the property, and fully and fairly answers the purposes of the code.

The most serious point is as to the sufficiency of the statement as to the condition of the property. It does appear

from the schedule that each of the two parcels was improved, that one had been set apart as a homestead for the period of administration, and that the other was encumbered by : mortgage for ten thousand dollars. This was not a very full statement of the condition of two city lots. The case of *Richardson v. Butler*, 82 Cal. 174,¹ holding that the designation of a city lot as "unimproved" is a sufficient description of its "condition," is hardly authority for the proposition that the designation of a city lot as "improved" would be sufficient, for the difference in this regard between an improved and an unimproved city lot is manifest.

As was said by this court in *Estate of Smith*, 51 Cal. 563. "The court should be informed by the petition of the condition of the property; that is, whether the property is improved or unimproved, productive or unproductive, occupied or vacant, and the like." This is for the purpose of enabling the court to intelligently exercise its judgment in the selection of the property of the estate which can be most advantageously sold. If timely and proper objection had been made to the petition on this ground, it would undoubtedly have been sustained. But the statement of condition here was certainly as complete as that involved in the case of *Estate of Devincenzi*, 119 Cal. 498, where the only statement as to a piece of land, in addition to its value and the fact that it was improved, was, that its condition was "fair." Manifestly, no one could tell what was meant by the word "fair" in that connection. It was there said that the petition purported to state the condition, and that although the statement was not very definite, and might have been objected to at the hearing on the ground of uncertainty, no such objection having been made, it was sufficient to authorize the court to receive evidence in reference to the condition of the property, and to determine whether, in view of the condition of the estate, it would authorize its sale. It is true that in that case the attack was collateral, being the objection of a purchaser to the confirmation of a sale made to him, and it is further true that the estate of decedent consisted of a single piece of real property. As was said in that case, however, the statute does not specify any "*particulars*" of the condition of the property which are to be set forth in the petition, and as against

¹ 116 Am. St. Rep. 101.

one who was not only legally notified, but who actually appeared in the lower court, and failed to make special objection on this ground, we are satisfied that the action of the lower court in holding the statement to be sufficient should be affirmed. The record does not indicate that there was any claim in that court that the parcel finally ordered sold was not the parcel that could be most advantageously sold, and also shows very clearly that a sale of one of the parcels was necessary to pay the debts of the deceased.

As to the omission to state the amount due or to become due on the family allowance, the petition was sufficient in the absence of special objection. If there had been any amount due or to become due thereon, it should, of course, have been stated, and if there was no amount due or to become due, it would have been the better practice to so state although the statute does not in terms so require. The sale was, however, not ordered for the purpose of paying any family allowance, and we will not, upon appeal, indulge in the presumption that there was anything due or to become due. It may also be remarked that if anything was so due or to become due, it created a greater necessity for the sale for the purposes for which the sale was ordered. The omission to state that the persons who were named in the petition as the devisees and legatees were also the only heirs of deceased, as appears from the order, was not fatal to the validity of the order. As a matter of fact, the names of all the heirs were stated in the petition. This fact is established by the order of sale.

There is nothing in the objection that the petition did not sufficiently show the character of petitioners as executors, for all the purposes of a petition for an order of sale presented to the court in which the estate was pending, and by which court they must have been appointed, if appointed at all.

The order is affirmed.

Shaw, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[S. F. Nos. 3555, 3565. Department One.—January 16, 1904.]

In the Matter of the Estate of HENRY LEVY, Deceased.

No. 3555. HATTIE ROSENBLUM et al., Children and Heirs, and Legatees and Devisees of Decedent, Appellants, v. PAULINE LEVY, Widow, et al., Respondents.

No. 3565. MYER JACOBS, and HERMAN MORRIS, Executors, etc., Appellants, v. PAULINE LEVY, Widow, et al., Respondents.

ESTATES OF DECEASED PERSONS—ORDER SETTING APART HOMESTEAD—APPEAL—PARTIES AGGRIEVED.—Both the executors under the will of a deceased testator and the devisees and legatees named in the will are parties aggrieved by an order setting apart a homestead for the widow for and during the administration of the estate and until its final distribution, and may appeal therefrom to this court.

ID.—EFFECT OF HOMESTEAD ORDER—DEVISEES ESPECIALLY AGGRIEVED.—The effect of the homestead order is to remove the premises set apart from the disposition of the will and to vest title thereto, subject to the order, in the heirs of the deceased as distinguished from the devisees; and where the devisees will not as heirs receive as large shares of the property as they would have received as devisees, they are especially aggrieved by the order.

ID.—PROPERTY SUBJECT TO HOMESTEAD—FAMILY RESIDENCE—BUILDING COMPOSED OF FLATS.—An entire building composed of three flats having separate entrance-doors in front, and connected together by a stairway in the rear, the top one of which was occupied as a family residence by the deceased testator and his wife up to the time of his death, could have been legally selected as a homestead, together with the lot on which the building stands; and it may be properly set apart to the widow as a homestead by the probate court for a limited period, having a just regard to the rights of others interested in the estate.

ID.—USE OF BUILDING FOR OTHER PURPOSES.—Where a portion of a building is actually used *bona fide* as a family residence, and not primarily as merely incidental to a business, it may be selected as a homestead, with the land on which it is situated, no matter how large a part thereof may be used for other purposes than for a family residence.

ID.—CONSTRUCTION OF HOMESTEAD—REMEDIAL STATUTE.—The homestead statute is a remedial measure and should be reasonably construed.

ID.—PROBATE HOMESTEAD—VALUE NOT LIMITED.—There is no specified limitation of value in the case of a probate homestead if the estate is not insolvent; and the court may set aside such property, regardless of its value, in view of the value and condition of the estate, as may seem just and proper. The fact that the premises set apart were valued at seventeen thousand five hundred dollars, and constituted in value one half of the estate, does not impair the homestead right in the absence of a statutory limitation as to value.

ID.—SUBORDINATE RIGHTS.—The rights of creditors, and of heirs, devisees, and legatees, though proper to be considered, are subordinate to the right of the family to a home; and, if it is necessary to take the entire estate for a homestead, such subordinate rights must yield.

APPEALS from an order of the Superior Court of the City and County of San Francisco setting apart a homestead to the widow of a deceased testator. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

T. E. Pawlicki, and Otto Wise, for Hattie Rosenblum et al., Appellants in No. 3555, and Respondents in No. 3565.

Arthur J. Dannenbaum, for Executors, Appellants in No. 3565, and Respondents in No. 3555.

W. T. Kearney, for Pauline Levy, Widow, Respondent in both appeals.

Hugo D. Newhouse, for Edward Calame, Assignee of Louis B. Levy, Respondent in both appeals.

ANGELLOTTI, J.—These are appeals from an order setting apart from the property of the estate of deceased a homestead for the use of the surviving wife for and during the period of administration of said estate and until its final distribution. One appeal is taken by the executors of the will of deceased, and the other by certain devisees and legatees under his will. It cannot be held that the executors are not “parties aggrieved” by such an order, within the meaning of those words as used in the law relative to the right of appeal. (*In re Heydenfeldt*, 117 Cal. 551.) The devisees appealing are specially aggrieved by the order by reason of the fact

that under the settled law in this state the effect of the homestead order is to remove the premises set apart from the disposition of the will, and to vest title thereto, subject to the order, in the heirs of the deceased, as distinguished from the devisees. (Code Civ. Proc., sec. 1468; *Estate of Walkerly*, 108 Cal. 627, 655;¹ *Estate of Matheny*, 121 Cal. 267.) While all such devisees are heirs of the deceased, they will not, as heirs, receive as large shares of the property as they would have received as devisees.

It is contended by appellants that the property set apart should not have been set apart for two reasons, which are, substantially: 1. That the property was of such a character that it was not capable of being selected as a homestead; and 2. That the homestead set apart is excessive in value, considering the value and condition of the estate.

The property set apart consisted of a lot of land in the city and county of San Francisco, with a frontage of twenty-five feet on Ellis Street, and a depth of one hundred and thirty-seven and one half feet, with the frame building thereon. This building was three stories in height, and was subdivided into three flats of one floor each, each flat having a separate street-entrance door on Ellis Street, and being separate and distinct from the remaining flats, except that all of them were connected by a stairway which ran from the ground in the rear of the building, and connected with the kitchen-doors of all of said flats. The top flat, which the testimony showed was more valuable than either of the other flats for rental purposes, was occupied by respondent and deceased as their home prior to and up to the time of the death of deceased, and has been so occupied by respondent ever since the death of her husband.

The lot was appraised at the sum of \$7,000, and the building thereon at \$10,500. The only other real property of the estate, except a cemetery lot, was a lot on McAllister Street in said city, fifty-five by one hundred and thirty-seven and one half feet, appraised at \$15,000, with improvements thereon consisting of a three-story frame building, containing a store and two upper floors, appraised at \$3,500, and another two-story frame building, the character of which does not ap-

¹ 49 Am. St. Rep. 97, and note.

pear, appraised at \$1,200, all of the same being encumbered by a mortgage for \$10,000. The whole estate was appraised at \$41,419.25, and was found to be solvent. So far as appears, there was no creditor other than the holder of the mortgage above referred to, and no property suitable for homestead purposes other than the property set apart.

1. Admittedly, the court in probate proceedings has the power to set apart premises as a homestead, if they be suitable and proper for residence purposes, and could have been legally selected as a homestead during the continuance of the marriage if the parties then actually resided thereon. There is no question as to the suitability of the building here involved for residence purposes, and, leaving out of consideration the question of value, we are satisfied that under the provisions of our statute and the numerous decisions of this court in regard thereto the premises set apart could have been legally selected as a homestead during the continuance of the marriage.

Section 1237 of the Civil Code provides that "The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as in this title provided."

Appellant's claim appears to be, that there were in fact three dwelling-houses upon the land; that a court may set apart only one dwelling-house; and that as the land is an ingredient part of the homestead, and a separation of the land and one dwelling-house from the other two dwelling-houses is impossible, owing to the manner of construction, no homestead at all can be set apart.

When the statute speaks of the "dwelling-house" it means the "building" which is occupied as a dwelling-house by the family, and not such portion of the building as may be actually used by the family for residence purposes. It is well settled, as was said by this court in *Heathman v. Holmes*, 94 Cal. 291, that "using a building partly, or even chiefly, for business purposes, or renting part of it, is not inconsistent with the right of homestead, provided it is, and continues to be, the *bona fide* residence of the family." In that case the homestead claimant built a large addition to his family home for hotel purposes, and leased the house, reserving a few rooms for the use of himself and family, in which they con-

tinued to lived. Under these circumstances he executed his declaration of homestead. It was held that the homestead claim was valid. In *Skinner v. Hall*, 69 Cal. 195, the whole house, with the exception of the room in which the claimant resided, was at the time of the filing of the declaration rented to and occupied by another. The homestead was upheld. In *Estate of Ogburn*, 105 Cal. 95, the building was divided into two nearly equal parts, one being used by the claimant as a tin-shop, and the other used partly for the millinery business of the wife, and partly by the family as their home. The whole building was held to be subject to selection by the claimant as a homestead, and properly set apart as such by the probate court. (See, also, *In re Lahiff*, 86 Cal. 151; *Ackley v. Chamberlain*, 16 Cal. 181.¹) These cases are all authority for the proposition that if a building is the actual *bona fide* residence of a party, he may legally select it and the land on which it is situated as a homestead, even though, incidentally, a part thereof, no matter how large, may be used by him for other purposes than those of family residence. There is no decision of this court in conflict with this view. The cases cited above are clearly distinguishable from another line of cases laying down an equally well-settled doctrine, viz.: That the use of the property is an important element to be considered, and that where the building is occupied by the claimant primarily for other purposes than those of residence, the occupancy of a portion thereof by him and his family being *for the purpose of conducting a business therein*, and but incidental to the business, the property cannot be legally selected as a homestead. (*Laughlin v. Wright*, 63 Cal. 113; *McDowell v. His Creditors*, 103 Cal. 264;² *Beronio v. Ventura County Lumber Co.*, 129 Cal. 232.³ See, however, *Gaylord v. Place*, 98 Cal. 472.) In no case has it been decided that where a portion of a building is dedicated to residence purposes, and is actually occupied by the claimant as the home of himself and his family, and such occupation is not merely incidental to the carrying on of some business in other parts of the building, the building and the land on which it is situated cannot be legally selected as a home-

¹ 76 Am. Dec. 516.² 79 Am. St. Rep. 118.³ 42 Am. St. Rep. 114.

stead. In *Estate of Noah*, 73 Cal. 590,¹ the property which it was sought to have set apart consisted of a four-story brick building of the value of twenty-five thousand dollars, which had been erected and occupied exclusively for business purposes.

Appellants rely also on a line of cases where it is held that where two or more buildings suitable for dwelling-house purposes, belonging to the claimant, are situated upon the same parcel of land, and the claimant resides in one, he can legally select but one as a homestead. (*In re Liggett*, 117 Cal. 352;² *Tiernan v. His Creditors*, 62 Cal. 286; *Maloney v. Hefer*, 75 Cal. 422;³ *Lubbock v. McMann*, 82 Cal. 226;⁴ *In re Allen*, 78 Cal. 293.) The distinction between these cases and the case of a single building is obvious. Under the express terms of the statute the homestead "consists of the dwelling-house in which the claimant resides and the land on which the same is situated." While this definition may include not only the land on which the dwelling-house stands, and of which it has become a part, but also such other land as may be necessary to its convenient use and occupation, it does not, when fairly construed with a view to the objects of the homestead law, include such other land as has resting thereon, as a part thereof, a building or buildings devoted to other purposes than those of a family home.

In the case at bar, one floor of a three-story residence building was actually occupied as the family home, the occupation being solely for the purposes of such a home, and not merely incidental to some other purpose. The place so occupied was an integral part of the land on which the building stood. The fact that the building contained two other stories so constructed that they were more adapted for renting purposes, by being built with separate street-entrances, could not impair the right of the claimant to select as a homestead the building and all of the land on which it stood. While those floors may have constituted separate dwelling-places, there was but one building, incapable of division, and the form of construction of the building is immaterial.

The case comes fairly within the doctrine of *Heathman v.*

¹ 2 Am. St. Rep. 834.

² 59 Am. St. Rep. 190.

³ 17 Am. St. Rep. 180.

⁴ 16 Am. St. Rep. 108.

Holmes, 94 Cal. 291, and we have no doubt that the property could have been legally selected as a homestead during the life of the husband. As has been frequently said, the homestead statute is a remedial measure, and should be liberally construed.

Being suitable for residence purposes at the time of its selection by the court, and of such a character that it could have been legally selected during the life of the husband, it was capable of selection by the court.

2. It is settled that there is no specified limitation of value in the case of a probate homestead, the rule being, that the court may set apart such property as, regardless of its value, in view of the value and condition of the estate, may seem just and proper. (*Estate of Walkerly*, 81 Cal. 579; *In re Smith*, 99 Cal. 449.) It has been held that where an estate is insolvent, the court must take into account the rights of creditors, and as the legislature has fixed the sum of five thousand dollars as the limit in value which the debtor may claim for his homestead against the demands of his creditors, "a wise exercise of judicial discretion would limit the homestead to be so set apart to this amount in value in the case of an insolvent estate, where a homestead of this value can be divided from the remainder of the estate, or where the property sought to be set apart is capable of such admeasurement." (*Estate of Adams*, 128 Cal. 380, 384.)

While the rights of creditors are not to be disregarded in setting apart a homestead, they "are subordinate to the right of the family to a home" (*Estate of Adams*, 128 Cal. 383). and if in order to set apart such a home it be necessary to take the entire estate of the deceased, the creditors' rights must yield. (*Keyes v. Cyrus*, 100 Cal. 322.¹) Heirs, devisees, and legatees occupy, at best, no more advantageous position than creditors. (*Sulzbürger v. Sulzbürger*, 50 Cal. 385; *In re Davis*, 69 Cal. 458; *Estate of Lahiff*, 86 Cal. 151.) While they have rights which should be considered, the family is first entitled to a home, if there be property capable of being set apart as such; and where the only premises suitable for homestead purposes are indivisible, and no homestead can be given to the family unless the whole of such premises is given,

¹ 88 Am. St. Rep. 296.

the fact that such premises are valued at seventeen thousand five hundred dollars, and constitute in value nearly one half of the estate, does not impair the homestead right, in the absence of a statutory limitation as to value.

As before stated, there is here no question as to the right of any creditor, and, so far as the record goes, it shows that the only other premises were appraised at a higher sum, and fails to indicate that the same, or any portion thereof, was of such a character that it could be set apart as a homestead.

In view of the peculiar condition of this estate, the action of the court below was just and proper. Being unable to divide the only property suitable for homestead purposes, it was necessary to set aside the whole of such property, but it was set apart for the most limited period, the period of administration of the estate, and it was further provided that the family allowance theretofore granted should cease and determine. Thus the rights of all others interested in the estate were preserved so far as was practicable.

The order is affirmed.

Shaw, J., and Van Dyke, J., concurred.

[S. F. No. 2853. Department One.—January 18, 1904.]

THE HIBERNIA SAVINGS AND LOAN SOCIETY, Re-
spondent, v. LEON H. COCHRAN et al., Defendants;
FRANK C. CLARK, Appellant.

FORECLOSURE OF MORTGAGE—PARTIES—UNRECORDED DEED—LIS PENDENS
—REPRESENTATION OF GRANTEE BY MORTGAGOR.—A grantee of the mortgage who holds an unrecorded deed made prior to the commencement of an action to foreclose the mortgage, in which a notice of *lis pendens* has been filed for record, and of which deed the plaintiff had no actual notice when the action was commenced, is not a necessary party to the action, and is bound by the decree rendered therein against the mortgagor, who fully represents the grantee for all the purposes of obtaining jurisdiction.

Id.—**SUBSEQUENT KNOWLEDGE IMMATERIAL.**—It is immaterial that subsequent to the commencement of the action it comes to the knowledge of the plaintiff that the mortgagor, prior or subsequent to the commencement of the action, conveyed the mortgaged property to another. The situation is determined by the condition of affairs at the time of the commencement of the action.

Id.—**JURISDICTION OF PERSON OF MORTGAGOR—VOLUNTARY APPEARANCE.**—The voluntary appearance of the mortgagor at any time within three years after the commencement of the action gives jurisdiction of his person, and is equivalent to personal service of the summons and copy of the complaint upon him within that period.

Id.—**RETURN OF SUMMONS—POWER OF COURT.**—Notwithstanding the return of the summons and the fact that the clerk had lost power to issue an *alias* summons, the court had the power either to order the returned summons to be served, or to order a new summons to be issued for service.

Id.—**RIGHTS OF PURCHASER—DEFENSE OF INTERESTS—SPECIAL APPEARANCE—MOTION TO VACATE AND DISMISS.**—A purchaser holding an unrecorded deed *ante litem* has the same right as a purchaser *pendente lite* to appear and ask to be made a party defendant, for the protection of his interests; but by his course in appearing specially before judgment to move to vacate the appearance of the mortgagor and dismiss the action, he in effect declined to become a party; and his subsequent motion after judgment to vacate the judgment, and to set aside the default and appearance of the mortgagor, and to dismiss the action on the same grounds on which his former motion was made, was properly denied.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a motion to vacate a judgment and to set aside a default and appearance of a mortgagor, and to dismiss an action. James M. Seawell, Judge.

The facts are stated in the opinion of the court.

A. Boyer, for Appellant.

Tobin & Tobin, for Respondent.

ANGELLOTTI, J.—This is an appeal by one Frank C. Clark from an order denying his motion to vacate the judgment entered in favor of plaintiff in the above-entitled action, to set aside the default and appearance of defendant Cochran, and to dismiss the action.

The action was instituted by plaintiff on November 19, 1898, to foreclose the lien of two mortgages executed to it by defendant Cochran, against Cochran and defendant Metzger, a junior mortgagee. Notice of *lis pendens* was regularly recorded on the same day. Cochran had on September 1, 1898, conveyed the property covered by the mortgages to one Schnaittacher, but the deed to him was not placed of record until June 14, 1900, and, so far as appears, the fact of such conveyance was unknown to plaintiff. On June 14, 1900, Schnaittacher conveyed the property to appellant, who placed his deed of record on the same day. Neither Schnaittacher nor appellant was ever made a party to the action or applied to be made such.

Summons was duly issued in the action, and on November 22, 1898, returned unserved on Cochran. No *alias* summons was issued, but on July 23, 1900, Cochran voluntarily filed his written appearance.

Thereupon, on August 29, 1900, appellant appeared specially, for the purpose of moving to set aside such appearance of Cochran and for a dismissal of the action, which motion was on November 30, 1900, denied.

On January 17, 1901, the default of Cochran was regularly entered, and upon his default and the answer and cross-complaint of defendant Metzger judgment of foreclosure was entered February 2, 1901, as prayed for in the complaint and cross-complaint.

On March 12, 1901, appellant gave notice of the motion, from the order denying which this appeal is taken.

The grounds upon which this motion would be made, as well as the motion made prior to judgment, as specified in the respective notices, were substantially that Cochran was never served with summons, that he did not appear in the action until after he had parted with all his interest therein, and that such appearance was made at a time when he could not have been served with a valid summons under the provisions of sections 408 and 581 of the Code of Civil Procedure, or at all, the claim in this connection being that he could not under such circumstances by a voluntary appearance give the court jurisdiction to enforce the lien of the mortgages against property in which he no longer had any interest.

There is not the slightest pretense that appellant, as the successor in interest of the mortgagor to the mortgaged property, had any defense, legal or equitable, to urge against the enforcement of the mortgage liens, or that plaintiff obtained anything by the foreclosure decree to which it was not justly entitled upon its mortgages.

Something is said about plaintiff having itself procured the appearance of Cochran at a time when it had knowledge of the deed executed by him, but, conceding this to be true, we deem it entirely immaterial to the determination of the question presented by this appeal.

Schnaittacher, the grantee by deed made prior to the commencement of the action, was not a necessary party defendant, for his deed had not been recorded when the action was commenced, and the plaintiff had no actual notice of such conveyance. The statute relating to actions for the foreclosure of mortgages expressly provides that such a grantee need not be made a party, and that the judgment in such an action is "as conclusive against the party holding such unrecorded conveyance or lien as if he had been a party to the action." (Code Civ. Proc., sec. 726.)

So far as the records showed, Cochran and Metzger were the only proper parties defendant. An action to foreclose a mortgage having been regularly commenced against all necessary parties, and notice of *lis pendens* recorded, the court obtains complete jurisdiction to enforce the mortgage lien against the mortgaged property, so far as all persons claiming under the mortgagor are concerned, by obtaining jurisdiction of the persons of the original defendants. It can make no difference, in this connection, that, subsequent to the commencement of the action, it comes to the knowledge of the plaintiff that the mortgagor prior or subsequent to the commencement of the action, conveyed the mortgaged property to another. The person who purchases prior to the action, subject to the mortgage, and who fails to record his deed prior to the commencement of the action, and of whose interest the mortgagee has no notice at the time he commences his action, never can become a necessary party, in the sense that it is necessary to bring him in, in order that a foreclosure decree effectual against him may be rendered. The situation as to him in this regard is determined by the condition of

affairs at the time of the institution of the action. For all purposes of obtaining jurisdiction the mortgagor fully represents him. Those who acquire the property subsequent to the commencement of the action, in the face of the recorded *lis pendens*, or with actual notice of the suit, are of course not necessary parties. (*Hibernia Sav. and Loan Soc. v. Lewis*, 117 Cal. 577, 580.)

Jurisdiction of the persons of the original defendants may be acquired by service of summons or by their voluntary appearance at any time within three years of the commencement of the action. (Code Civ. Proc., secs. 416, 581.) It appears to be conceded that if summons had been regularly served upon Cochran, there would be no question as to the jurisdiction of the court. It is urged, however, that a defendant who has parted with his interest in the property cannot give an appearance that will bind his successor in interest, without the consent of such successor. But "the voluntary appearance of any defendant is equivalent to personal service of the summons and copy of the complaint upon him." (Code Civ. Proc., sec. 416.) Whatever jurisdiction is acquired by service is therefore acquired by a voluntary appearance. It was expressly held by this court in *Hibernia Sav. and Loan Soc. v. Lewis*, 117 Cal. 577, 580, against a purchaser *pendente lite*, that the court acquired jurisdiction of a mortgagor by reason of his voluntary appearance made nearly three years after the commencement of the action, and at a time when he had conveyed the mortgaged property to the appellant. In that case, as in this, the time for the issuance of an *alias* summons by the clerk had expired before the appearance, and practically the same contention was there made by the purchaser *pendente lite* as is here made for the purchaser *pendente lite* from the purchaser *ante litem*. That case fully answers the contention of appellant upon the question of jurisdiction.

It is urged that such an appearance will not be effectual if made at a time when the court could not acquire jurisdiction over the defendant by service of process, and that the original summons having been returned and no *alias* summons issued by the clerk within a year (Code Civ. Proc., sec. 408), the defendant could not longer be legally served. The weakness of appellant's contention in this behalf lies in the fact that

the summons could be served at any time within three years from the commencement of the action, and that, notwithstanding the fact that an *alias* summons could not be issued by the clerk (Code Civ. Proc., sec. 408), it was within the power of the court either to order the summons that had been returned to be served upon Cochran or to issue a new summons for that purpose. (*Rue v. Quinn*, 137 Cal. 651, 657.) It is therefore unnecessary to determine what the situation would have been if jurisdiction could not at the time of the appearance have been acquired by service of process.

We have examined the various cases cited by appellant, and find that they in no degree sustain his contention. It is not to be doubted that a purchaser *pendente lite* is entitled to be heard, if he so desires, in order that he may protect the property he has acquired against any improper claim, and doubtless any stipulation in fraud of his rights entered into by his grantor and the other parties to the action, or any judgment obtained by fraud, could be successfully attacked by him. It may be assumed that the purchaser *ante litem*, whose conveyance was not of record, has the same rights that one who acquires *pendente lite* possesses. In a foreclosure proceeding such purchasers could probably, on their application, be made parties defendant, and thus be enabled to fully protect their interests. These, however, are not matters going to the jurisdiction of the court to render a valid foreclosure decree, and are in no way involved in this case.

No application was ever made by appellant to be made a party, or to be allowed to, in any way, participate in the action. With full actual knowledge of the proceeding, shown by his special appearance therein before judgment, for the purpose of obtaining a dismissal, and with full opportunity to protect his interests, he has never intimated that plaintiff did not have a valid lien upon the property for the full amount claimed by its complaint, or that his interest in the property is not subject to plaintiff's claim. Appearing specially before judgment for the sole purpose of moving to set aside the appearance of Cochran and for a dismissal of the action, he, in effect, declined to be made a party. His motion made at that time was entirely without merit, and his subsequent motion to set aside the judgment and dismiss the action,

made upon the grounds urged on the previous motion, was properly denied.

The order is affirmed.

Shaw, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[S. F. No. 2836. Department One.—January 18, 1904.]

GEORGE E. HARTER, Appellant, v. CITY OF SAN JOSE et al., Respondents.

PUBLIC PARK—DEDICATION BY LEGISLATURE—POWER OF LEASE UNDER CHARTER—INJUNCTION BY TAXPAYER—DISSOLUTION.—Where a public park of several hundred acres, at a distance of seven miles from the center of a city, was never dedicated by individuals, but was originally surveyed for a park by the city authorities, and was dedicated as a public park by an act reincorporating the city, and such act and each subsequent charter of the city, including the present charter, approved by concurrent resolution of the legislature, authorized a lease of some portion of the park, and a lease of two and a half acres thereof was made for hotel purposes, as provided in its present charter, in such a way as not in any manner to restrict or interfere with the free use of the waters or grounds of the park by the public, and the lease was for the evident benefit of the public and of the city, a taxpayer cannot sustain an injunction to prevent the execution of such lease; and a temporary injunction issued at his suit was properly dissolved.

ID.—CHARTER—CIVIL CODE.—The injunction was properly dissolved, whether the lease is to be deemed authorized by the express terms of the city charter or is subject to the limitations of sections 711 and 718 of the Civil Code. The lease, if subject to those sections, would be valid as to the period allowed thereby, and only void as to the excess of the period.

APPEAL from a judgment of the Superior Court of Santa Clara County and from an order dissolving an injunction.
A. L. Rhodes, Judge.

The facts are stated in the opinion.

Henry French, Rodgers, Paterson & Slack, Charles W. Slack, and Jerome L. Van Dewerker, for Appellant.

William A. Beasley, for Respondents.

COOPER, C.—Upon the filing of the complaint in this action the court below granted a temporary injunction. Afterward an amended complaint was filed. To this complaint defendant demurred, and at the same time moved to dissolve the temporary injunction. The court sustained the demurrer and made an order dissolving the injunction. Judgment was thereupon entered in favor of defendants.

Plaintiff appeals from the judgment and the order dissolving the injunction. Plaintiff, as a resident and taxpayer of the city of San Jose, seeks to maintain the action against the city and the other defendants—the mayor and common council—to enjoin them from executing a lease. The complaint alleges that there is within the county of Santa Clara, subject to the jurisdiction of San Jose, a tract of land of about four hundred acres, known as the “City Reservation,” or “Alum Rock Park,” and that the same is a public park, to the free use of which the plaintiff and the people of the city are entitled; that the defendants are about to, and will unless restrained, execute and deliver a lease to one Terry of two and one half acres of the said park for hotel purposes for a period of twenty-five years, said proposed lease being set out in an exhibit annexed to the complaint.

It is further alleged that the defendants have no power to execute the said lease; that such lease will deprive plaintiff and the residents of said city of the free use of the said park, destroy and injure the trees and shrubbery growing thereon, and mar the natural beauty thereof, to the great and irreparable injury of plaintiff and the residents of the city of San Jose.

The present charter of the city provides that a portion of the city park “may be leased for hotel purposes only, not exceeding two and one half acres, for a term of not more than twenty-five years, but no such lease shall in any manner restrict or interfere with the free use of the waters and grounds of the park by the public.” (Charter of San Jose, sec. 1, subd. 19, Stats. 1897, p. 602.)

The contemplated lease is of two and one half acres and for the term authorized by the charter, and provides: "The premises leased hereby, and the business conducted thereon, shall at all times be subject to such stipulations and restrictions as may be prescribed by the park commissioners, and this lease shall not in any manner restrict or interfere with the free use of the waters or grounds of the park by the public."

Therefore, it is plain that the present charter gives the authority to execute the lease. In fact, the appellant does not contend otherwise.

The main contention is, that the park was dedicated to the public solely for a public park, and that the city authorities cannot devote any portion thereof to other purposes. The cases cited and relied upon in support of the contention arose where the original title was conveyed by private parties for the use of a park or other named public use. For the purposes of this case, it may be conceded that where the title is in a private party, and such private party conveys land to the public for a certain definite public purpose, it cannot be diverted to another and different purpose not connected with the original dedication. The title in such case remains in the original owner, subject to the public use. The public takes it in trust and for the public purpose designated in the instrument of conveyance. There may be cases where the public authorities have diverted or dedicated the property of the municipality for a public park or other public purpose under such circumstances that individuals have acquired rights with reference thereto that would entitle such individuals to insist that the city authorities should not be allowed to divert the property to other and independent purposes; but in this case the property was not dedicated nor conveyed by an individual to the public for the purposes of a park. The plaintiff does not claim to be the owner, nor to have acquired any rights with reference to the park other than such as is possessed by every taxpayer in the city.

It appears that on September 13, 1866, it was resolved by the mayor and common council that the committee on public buildings proceed at once to cause a survey of such parts of the lands on and in the vicinity of Penitencia Creek as they

may deem necessary for the purpose of being set apart for a public park.

In March, 1867, the present park was, by virtue of said resolution, surveyed by one Bowen, the county surveyor, and a plat and field-notes made. On March 13, 1872, the legislature passed an act entitled "An act to reincorporate the city of San Jose." (Stats. 1871-1872, p. 333.) Section 63 of this act provided that the tract of land surveyed by Bowen (being the present park) "be and the same is hereby declared a public park. . . . Provided, that said mayor and common council may lease the same for a term not exceeding ten years upon such terms and conditions as they may deem proper, but such lease shall not authorize or permit any use of disposition of said park or reservation as to prevent the free use thereof during the existence of such lease by the people of said city as a public park."

The said act took effect immediately. The acts of the city authorities, as thus approved by the legislature, constituted a dedication by the city to itself as a public park. No acceptance other than this was necessary. The dedication was complete upon the approval of the act. (*Hoadley v. San Francisco*, 50 Cal. 273.) Thus it is plain that the original dedication authorized the mayor and common council to lease all the park upon such terms and conditions as they might deem proper, the term of such lease not to exceed ten years. The act did not attempt to specify the purpose for which such lease might be executed, but left it wholly in the discretion of the mayor and common council. Thus the dedication was on the condition that the park or any portion of it might be leased.

On March 15, 1872, the legislature passed another act, entitled "An act to provide for the opening and improving of Santa Clara Avenue in the county of Santa Clara." (Stats. 1871-1872, p. 370.) This act created a board of commissioners, who were authorized to expend money and improve Santa Clara Avenue. It was therein provided that "Said land thus selected [the park] shall be designated by suitable monuments, and shall be and remain a public park for public uses forever, and shall be under the charge, control, and management of the board of commissioners hereby created."

Appellant contends that this latter act had the effect of making a dedication of the park, without any conditions as to leasing or any power to lease. We do not think such was the effect of the act. The tract of land had already been dedicated by the city authorities under the former act of March 13, 1872. The latter act could not dedicate that which had already been dedicated. It could, and did, place the management and control of the park in the board of commissioners. If appellant's argument be conceded, then it must also be conceded that the legislature could, after the dedication, change the conditions upon which the dedication was made from time to time. And this the legislature has done. Thus in March, 1874, the charter of the city was amended, and the provisions as to leasing retained in substance as in the original act of March 13, 1872, authorizing the city authorities to lease for ten years on such terms and conditions as they deem proper. (Stats. 1873-1874, p. 418.) A few days later the Santa Clara Avenue act of March 13, 1872, was amended, authorizing the board of commissioners to lease any portion of the park for the purpose of securing the erection of buildings for resort, refreshment, and bathing. (Stats. 1873-1874, p. 539.) On March 16, 1878, the charter was again amended, retaining the substance of the original provision in regard to leasing. (Stats. 1877-1878, p. 289.) On the last-named day another act was passed for the purpose of putting an end to the authority of the board of commissioners of Santa Clara Avenue. This act again placed the management of the park in the mayor and common council, and authorized them to lease the whole or any portion of the park upon such terms and for such periods, not exceeding ten years, as they might deem advisable. (Stats. 1877-1878, p. 290.) The charter was again amended in 1891, authorizing the mayor and common council to lease any portion of the park for a term not exceeding twenty years. (Stats. 1891, p. 97.) Finally the present charter, approved by concurrent resolution on March 5, 1897, expressly authorizes a lease "for hotel purposes only, not exceeding two and one half acres, for the term of not more than twenty-five years." (Stats. 1897, p. 592.) Thus it is readily seen that every charter of the city, including that dedicating

the park, up to the present time, has authorized the leasing of the park or portions thereof. It therefore appears clearly that the contemplated lease was in the minds of the city authorities and of the legislature at the time the property was dedicated. Further, it does not clearly appear, in the absence of any power to lease in the original dedication, that the same parties who dedicated the land for a park might not agree to a use of a portion of it for hotel purposes. The charter was adopted by the city and by the legislature.

It was said in the *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 242:¹ "Where the property is taken, the owner paid its true value, and the title vested in the public, it owns the whole property, and not merely the use; and, though the particular use may be abandoned, the right to the property remains. The property is still held in trust for the public by the authorities. By legislative sanction it may be sold, be changed in its character from real to personalty, and the avails be devoted to general or special public purposes. . . . The legislature could discharge it from the trust to hold it for a park and empower it to sell. It has done so, and, so far as any express limitation in our state constitution is concerned, it had the power to do so."

In *Commissioners of Franklin County v. Lathrop*, 9 Kan. 463, it is said: "The conveyance once made, the trust is created. It can be destroyed only by the consent of the grantor of the trust and the beneficiary. It is beyond the reach of legislative power. But we are told that the grantors of this trust, by their subsequent conveyance, have conveyed all their remaining interests to the plaintiffs in error; that the public is the beneficiary, and that the legislature represents the public, so that we have here the consent of the grantor, the trustee, and the *cestui que trust*. This is probably true; and if this consent had been given before any private rights had been built up on this trust, it is difficult to see how this injunction could be sustained." It was, however, held in the latter case that, as the defendant had purchased after the property had been dedicated as a public square, and had made lasting and valuable improvements, which were enhanced by the square and would be diminished by a change, the trust could not be

¹ 16 Am. Rep. 70.

destroyed. The rule is discussed in Dillon on Municipal Corporations (4th ed., sec. 651), and it is there said: "As between the municipality and the general public, the legislative power is in the absence of special constitutional restrictions supreme, and so it is in all cases where there are no private rights involved. If the municipal corporation holds the full title to the ground for public uses, without restriction, the legislature may, doubtless, direct and regulate the purposes for which the public may use it."

But, further, we are not prepared to say that the public authorities in this case did not have the authority to make the contemplated lease under their general power to control and manage the park. It was some seven miles from the center of the city. It consisted of four hundred acres, only two and one half of which are to be leased. The leased premises were to be kept and maintained in first-class condition, and subject to the rules and regulations of the city authorities. Persons affected with certain diseases are not to be allowed as guests therein. The hotel is to be named "The San Jose Mineral Springs," or such other name as the mayor and common council consent to. It is evident that the city authorities desire to add to the comfort and attractions of the park without expense to the city, and at the same time derive an income from the lease. It is not shown that the contemplated lease will in any way detract from the use of the park by the public. In *Gushee v. City of New York*, 42 App. Div. 37, 58 N. Y. Supp. 967, it was held that the department of public parks had the right to lease a building in Riverside Park on the Hudson for a period of years for restaurant purposes. The court said "that in the control and management of the public parks of a great city it is perfectly proper to furnish not only such innocent amusements as may enhance the pleasure of those who resort to the parks, but such opportunities for rest and refreshment for themselves and their animals as may be required, will not be disputed. The doing of these things is no part of the public duty imposed upon municipal corporations as the agent of the state in the performance of its governmental functions, but rather a part of the business of the city, which it may not undertake in its private capacity, as the owner of the lands which have been set apart for park purposes. . . . Whether, in doing these things the authorities

shall act themselves, or whether they shall be performed by private persons under an agreement with the park authorities, must be left very largely to the discretion of those who have control of the parks. If, in their judgment, it shall seem better that the furnishing of refreshment shall be farmed out to some person for a consideration, subject to the regulation and control of the authorities, it cannot be said as a matter of law that such discretion is beyond their power."

The supreme court of Missouri held in a late case (*State v. Schweickardt*, 109 Mo. 496) that, under the power given to the city authorities of the city of St. Louis to regulate all parks belonging to the city, the city authorities could make a contract authorizing the sale of refreshments in Forest Park, and give the lessee possession of certain buildings on the premises for such purpose. The court said: "It seems, too, to be a matter of common knowledge that refreshments, both solid and liquid, refreshments of an intoxicating nature, are customarily served to the visitors of the great parks of this country, Central Park, New York; Fairmont Park, Philadelphia; and Golden Gate Park, San Francisco. On this basis of fact and of custom it cannot be regarded as any diversion of the legitimate uses of the park to have refreshments served in a manner contemplated by the ordinance and contract aforesaid. . . . And so long as the proprieties of life are observed, no one of the throng who visit such a locality has any grounds to insist that *his* method of conducting a park should be adopted instead of the plan deemed best by the regularly constituted authorities. Such intolerance, on whatever motive based, is at war with the theory and practice of our government and an enlightened civilization. Its voice should not prevail in a court of justice, and in this connection it should be constantly borne in mind that within the legislative sphere of their authority the discretion confided to municipal corporations is as proportionately wide as is a like discretion possessed by the government of the state, and as free from outside interference, and that discretion is not subject to judicial revision or reversal."

Applying the above principles, we do not think the contemplated lease in excess of the powers of the city authorities. The park contains mineral springs. The proposed hotel is for the use of the public, where those who desire may get food

and rest. It is to be under the supervision of the city. It, if properly conducted, will add to the attractions of the park. It will be no expense, but a profit, to the city. Nor do we think the appellant is entitled to relief because the contemplated lease is for twenty-five years instead of the time provided by sections 711 and 718 of the Civil Code. Such lease, if subject to the said sections, would not be void, except as to the excess of the period. The appellant is not entitled to an injunction if the authorities have the power to lease as prescribed in the charter.

The judgment and order should be affirmed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Angellotti, J., Shaw, J., Van Dyke, J.

[S. F. No. 2840. Department One.—January 18, 1904.]

MATHILDE MEETZ, Executrix etc., Appellant, v. TILLIE MOHR et al., Respondents.

TRUST-DEED—SALE TO PAY INDEBTEDNESS SECURED—INJUNCTION—DISSOLUTION.—An injunction to restrain a sale under a trust-deed to pay the indebtedness secured thereby was properly dissolved where it appeared by the plaintiff's own showing that the sale would not be made if he should pay the amount secured; and by the defendants' showing that no tender of any sum of money was ever made in payment or satisfaction of the indebtedness, and that plaintiff did not accept an offer of the creditor secured to receive a specific sum in full payment of his claim, except on account of his liability as an indorser of other notes of the plaintiff, which were secured by the deed of trust, and to discontinue the sale on payment of said sum, no part of which was ever paid.

ID.—EQUITY NOT DONE BY PLAINTIFF.—He who seeks equity must do equity; and where equity was not done before bringing the action and obtaining the injunction, nor when an opportunity was offered upon the hearing of the motion to dissolve the injunction, the order dissolving it was right and proper.

ID.—RIGHT OF SALE FOR MONEY DUE—LIABILITY AS INDORSER OF NOTES.

—The trustees under a deed of trust securing money advanced, and also a liability of the creditors as indorser for the grantor of the trust, had a right of sale for moneys due and unpaid to the creditors, and were not compelled to wait until the notes of plaintiff which he indorsed were all paid by the makers or by the creditors, before he could realize on the security held for the money actually advanced.

ID.—AMENDED COMPLAINT NOT FILED—COUNTER-AFFIDAVIT.—An amended complaint not allowed to be filed cannot be considered as any part of the showing on which the temporary injunction was granted, and can only be considered in the light of a counter-affidavit on the motion to dissolve the injunction.**ID.—SUFFICIENCY OF ADVERTISING—POSTPONEMENT OF SALE UPON REQUEST BEFORE SUIT.**—Where the deed of trust provided that the advertisement of sale should be made twice a week in some newspaper published in the city and county of San Francisco at least twice a week for three weeks, and the advertisement was claimed in the amended complaint to be insufficient because published in a paper not devoted to general news and of small circulation, such objection is not tenable where it appears that the sale was twice postponed at plaintiff's request, and was advertised twice a week for the period of eight weeks prior to the issuance of the injunction.**ID.—DEMAND—PLEADING—SUFFICIENCY OF ANSWER.**—Where the answer alleges a demand, and also alleges that the defendants have duly performed all the requirements of the deed of trust and agreement on their part to be performed as a condition precedent to the sale of the land, the answer is not objectionable on the ground that it does not allege a demand in writing.

APPEAL from an order of the Superior Court of the City and County of San Francisco dissolving an injunction. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

T. M. Osmont, for Appellant.

Mullany, Grant & Cushing, for Respondents.

VAN DYKE, J.—Following the complaint in this case, temporary injunction was issued, and the defendants thereafter, upon notice and supported by affidavit and answer to the complaint, moved the court to dissolve the same, which was granted, and the appeal is taken from such order dissolving the injunction.

The complaint stated substantially the following facts: That plaintiff's testator, Theodor Meetz, on the twelfth day of February, 1897, made and delivered to defendant, M. J. Rudolph Mohr, a promissory note for sixteen hundred dollars, and at the same time conveyed to Emil Mohr, as trustee, a deed of certain real estate in Kern County, also transferred to said Emil Mohr certain personal property, all as security for the payment of the said sixteen hundred dollars, and also to secure said Rudolph against any liability that might arise against him out of the indorsement of certain promissory notes for said Meetz, and any indebtedness that might be due to said Rudolph on open account. It was provided that in the case of default in the payment of said indebtedness the trustee should proceed to sell said property, and out of the proceeds of said sale discharge said indebtedness and render the surplus to said Theodor Meetz, and it was also provided that upon the payment of said indebtedness or the release of said Rudolph from the said indorsement upon said notes all the property referred to in said deed of trust and agreement should be reconveyed by the trustee to said Theodor Meetz. Thereafter, and prior to the commencement of the action, it was averred that Theodor Meetz died testate in the county of Alameda, the place of his residence, and that by his will plaintiff was named as executrix, and thereafter the will was duly probated, and she was appointed as such executrix of the will. It is further averred that the defendants Tillie Mohr and William F. Hoelscher, trustees, have advertised for sale said lands for payment of the indebtedness alleged to be due and owing from said Theodor Meetz to the defendant Rudolph Mohr, which is claimed by said Rudolph to be the sum of twelve thousand dollars, being the full amount of all the promissory notes mentioned, those that he had indorsed as well as the notes payable to him, but that, as plaintiff is informed and believes, the said estate is not indebted to said Rudolph Mohr in the sum of twelve thousand dollars, or in any sum in excess of two thousand dollars on said notes, exclusive of interest, and that the entire indebtedness now due or owing from said estate to said Rudolph does not exceed the sum of six thousand dollars, and that the said Rudolph never paid any of said notes which he indorsed, except a note of one thousand dollars to M. Kane, and that whether he is liable for the payment of

the remainder of said notes the plaintiff is not advised and is unable to state. It is also alleged that the defendants, as trustees, have advertised for sale at the same time certain certificates of capital stock of the Bayerque Land Company, a corporation,—to wit, six shares of the capital stock of the corporation. It is further averred that plaintiff is ignorant as to whether the first trustee, Emil Mohr, ever conveyed the property to the defendants Tillie Mohr and William F. Hoelscher, but is informed and believes that said defendants Tillie Mohr and Hoelscher claim the said conveyance has been made, and that they are the successors in trust of the said Emil Mohr. It is further averred that in February, 1900, the plaintiff tendered to Rudolph Mohr the sum of seven thousand dollars towards the payment and satisfaction of said indebtedness of the estate of Meetz, deceased, promising to pay the balance of said indebtedness later; that said sum so tendered was more than sufficient to pay and discharge all of said indebtedness, but that said Rudolph did not accept said money, but he assured plaintiff that he would take the matter into consideration, claiming that the entire amount of twelve thousand dollars was then due and owing, as aforesaid. It is further averred that the defendant trustees intend to proceed with the sale of said property, unless restrained by order of court, and the title of the plaintiff to said estate will be clouded, embarrassed, and prejudiced.

On the hearing of the motion dissolving the injunction it was shown by the answer of defendants and their affidavits that no tender of any sum of money whatever was ever made to said Rudolph in payment or satisfaction of the indebtedness mentioned in the complaint; that personal property pledged to secure said indebtedness was sold by the defendants before the issuance of the injunction; that the same was purchased by said Rudolph for twenty-five hundred dollars, which sum, together with certain earnings of the stock, was credited by him to said estate, leaving a balance due from said estate of \$3,759.75; that said Rudolph was willing to receive said sum in full payment of his claim, except his liability as indorser of said notes, and to continue to hold said deed of trust and the property thereby conveyed as the security to protect him against any liability on said notes indorsed by him, and not sell said property. Further, at said hearing

of the motion said Rudolph offered to accept said sum of \$3,759.75 in full payment of his claim, except on account of his liability as indorser of said other notes, and to discontinue the sale and publication of notice of sale of said land and premises, but plaintiff did not accept said offer, and did not pay said sum or any part thereof. Thereupon plaintiff moved to amend her complaint. The material averments in said amended complaint being, that defendant Tillie Mohr was, and still is, the wife of the co-defendant, M. J. Rudolph, and that said Rudolph claims a right under said deed of trust to appoint new trustees in place of said Emil Mohr, and, claiming such power, selected his wife, the said Tillie Mohr, together with the defendant William F. Hoelscher, to act as trustees, and it is averred upon information and belief that said Hoelscher was formerly a clerk or bookkeeper of said Rudolph Mohr, and that neither of said trustees have pecuniary means sufficient to respond to plaintiff for the proceeds of said trust property. It is further averred in said amendment to the complaint that by the deed of trust it is provided that the advertisement of sale of said property shall be made at least twice a week for three weeks in some newspaper published in the city and county of San Francisco, whereas the publication and notice in this case was made in a newspaper known as the "Journal of Commerce," published in said city and county, and that said "Journal of Commerce" is not a paper devoted to general news, and does not circulate among people generally, but that it is devoted to special subjects, and circulates among a comparatively small class of people only. The court denied the plaintiff's application to file the amendment to the complaint, and it can therefore only be considered in the light of a counter-affidavit, and not as a part of the showing on which the temporary injunction was granted.

It was claimed on the part of the appellant that it would be improper for the trustees to sell the land and hold the proceeds to protect Rudolph from his liability as indorser; but it is shown by the answer and affidavits that the defendants propose to sell the property only for the purpose of paying the amount due to Rudolph under said deed of trust, with the proper costs and expenses of sale, and that they did not propose to sell said land, or any part thereof, for the purpose of paying to said Rudolph any amount for which he is liable

by reason of his indorsement on said notes, save and except such amount as he had already paid at the time of the sale. It is conceded that the deed of trust was given as security, not only for the note of Meetz, but also for the repayment of moneys advanced by Rudolph, and to protect him from liability as indorser of Meetz's notes. Rudolph was not required, as contended by appellants, to wait until the notes he had indorsed were all paid by the makers or by himself before he could realize on the security he held for the money actually advanced by him. It is also contended that it was not shown that the defendant trustees were properly substituted in place of Emil Mohr, the original trustee. The complaint on which the temporary injunction was issued described the defendants Tillie Mohr and Hoelscher as trustees, and the answer alleges the substitution of trustees, showing that such substitution was made pursuant to the terms of the deed of trust.

The alleged insufficiency of the advertising is first mentioned in the amendment which the court refused to have filed. No question of that kind was raised in the complaint on which the temporary injunction was granted, and it appeared on the showing on behalf of the defendants at the hearing of the motion to dissolve the injunction that they not only postponed the sale twice at the request of the appellant after they began to advertise it, but advertised the sale twice a week for a period of eight weeks, instead of three weeks, prior to the issuance of the injunction.

Appellant suggests that defendants have no right to sell, because the answer does not allege a demand in writing, but the answer does allege a demand, and also alleges that the defendants have duly performed all the requirements of said deed of trust and said agreement on their part to be performed as a condition precedent to the sale of the land, and this is sufficient. (Code Civ. Proc., sec. 457; *Bradford Investment Co. v. Joost*, 117 Cal. 204.)

The plaintiff did not make any tender nor meet defendant's offer to accept a part of the amount claimed to be due, as already stated. Under these circumstances the court was

clearly right in dissolving the injunction. "A sale under a trust-deed will not be enjoined when it appears by complainant's own showing that no sale would be made if he should pay what he admits to be due and what he avers his ability and willingness to pay." (High on Injunctions, sec. 452.)

From the showing made in the court below it clearly appears that all appellant had to do to prevent the threatened sale was to pay the testator's debt, then overdue, to the defendant Rudolph Mohr, and which sale, in case of non-payment, was authorized by the deed of trust. There is no claim on the part of appellant that she has been prejudiced by the substitution of trustees or on account of the sale not having been otherwise advertised.

One who seeks equity must do equity, and the plaintiff in this case did not do so before bringing the action, and further failed and refused to do equity when an opportunity was offered at the hearing of the motion. The order of the court below, therefore, dissolving the injunction, under the circumstances, was right and proper.

Order affirmed.

Angellotti, J., and Shaw, J., concurred.

[S. F. No. 2722. Department One.—January 18, 1904.]

**WHITE SEWING MACHINE COMPANY, Appellant, v.
WILLIAM P. COURTNEL et al., Defendants; ALBERT
BROWN, Respondent.**

**BOND—SURETYSHIP—COMMISSION AGENT—CONTINUING GUARANTY—
REVOCATION AS TO FUTURE TRANSACTIONS.**—A bond conditioned in
substance that if an agent of the plaintiff for the sale of sewing-
machines on commission should pay all indebtedness then existing,
or that he might thereafter in any way incur, to the plaintiff, the
bond should be void, though technically a contract of suretyship,
is as to all future liability, for successive transactions not begun,
governed by the same rule as a continuing contract of guaranty,
under section 2815 of the Civil Code, and may be revoked at any
time as to future independent transactions, with respect to which
the consideration is not continuing.

**1d.—MODE OF REVOCATION—DEMAND FOR RELEASE OF SURETY—RELEASE
BY AGENT OF PLAINTIFF.**—A demand by the surety for a release,
and the consent thereto by plaintiff's agent, followed by the execu-
tion of a release, is the equivalent, and was in substance a revoca-
tion, of the contract by the surety; and the fact that the authority
of the agent to make the release was not in writing is not material.
No formal release was necessary to terminate the contract.

1d.—FUTURE SALE OF MACHINES.—The liability of the surety, after
such revocation and release, was extinguished in reference to a
future sale of machines by the plaintiff to the agent, and the surety
cannot be held liable for the price.

APPEAL from a judgment of the Superior Court of Ala-
meda County. W. E. Greene, Judge.

The facts are stated in the opinion of the court.

Morrison & Cope, and W. M. Gardiner, for Appellant.

The contract was one of specific suretyship on a note, and
not a continuing guaranty, and could not be revoked by the
surety. (*Page v. White Sewing Machine Co.*, 12 Tex. Civ.
App. 327; *McIntosh-Huntington Co. v. Reed*, 89 Fed. 464;
Saint v. Wheeler & Wilson Mfg. Co., 95 Ala. 362;¹ *Augham-
paugh v. Schmidt*, 77 Iowa, 13; *Brandt on Suretyship*, 2d ed.,
sec. 1133.) The release by the attorney was void, because

¹36 Am. St. Rep. 210.

not authorized in writing. (Civ. Code, sec. 2309.) The release was without consideration, and was *nudum pactum*. (20 Am. & Eng. Ency. of Law, 1st ed., pp. 744, 745.)

Parcels & Brown, for Respondent.

The bond is a continuing guaranty as to future transactions, and such guaranty may be revoked. (Civ. Code, secs. 2814, 2815; *McShane v. Padian*, 142 N. Y. 207; *Hatch v. Hobbs*, 12 Gray, 447; *Farmers and Mechanics' Bank v. Kercheval*, 2 Mich. 505; *Brandt on Suretyship and Guaranty*, secs. 157-164; *Agawam Bank v. Strever*, 18 N. Y. 502; *Howe Machine Co. v. Farrington*, 82 N. Y. 121; *Bostwick v. Van Voorhis*, 91 N. Y. 353; *La Rose v. Logansport Nat. Bank*, 102 Ind. 332; *Conduitt v. Ryan*, 3 Ind. App. 1; *Mathews v. Phelps*, 61 Mich. 327;¹ *Singer Mfg. Co. v. Draughan*, 121 N. C. 88;² *Weed Sewing Machine Co. v. Winchell*, 107 Ind. 260.) The written release, given at the surety's request, extinguished the obligation. (Civ. Code, sec. 1541.)

Mullany, Grant & Cushing, for Defendant Courtney.

SHAW, J.—This is a suit on a bond of the defendants to the plaintiff, dated January 27, 1895, in the penal sum of one thousand dollars. The condition of the bond in substance was, that if Courtney should pay to the plaintiff all indebtedness then existing, or that he might thereafter in any way incur, the bond should be void. Courtney was at that time about to become, or had been appointed, agent of the plaintiff for the sale of its machines, and as a part of the transaction a written agreement was made between the company and Courtney, providing for the consignment of sewing-machines to the latter, to be sold on commission at prices designated, under which agreement consignments were made. About the first of August of the same year, Courtney having become insolvent, and being about to institute proceedings in insolvency for his discharge, the defendant Brown demanded of the plaintiff's Pacific Coast manager, one Forden, to be released from the bond, and thereupon, with the consent of Courtney, and by direction of Forden, who had authority in that behalf,

¹ 11 Am. St. Rep. 581.

² 61 Am. St. Rep. 657.

a release was executed in the name of the plaintiff by its attorney, Creely. The court finds that this release was afterward ratified by the plaintiff. A small balance at this time due the plaintiff was afterward paid. Under a subsequent agreement between the plaintiff and Courtney, dated April 11, 1898, to which Brown was not privy, some machines were sold to Courtney and his notes taken for the purchase money in the aggregate sum of \$993, for which and interest this suit is brought.

The above facts appear from the findings of the court, and are fully supported by the evidence, except that the authority of Forden to execute releases was not in writing. Judgment was entered against the defendant Courtney, but in favor of the defendant Brown. The appeal is from the latter judgment.

The plaintiff's contention is based on the assumption that Brown, as surety, had no right to revoke the contract of suretyship, nor to demand and receive a release as surety as to future transactions between Courtney and the plaintiff, but that he was bound to continue responsible upon the bond for all time, and for all future transactions, so long as the plaintiff chose to continue dealings with Courtney. But such is not the effect of the transaction. It may be conceded that if the bond had recited that Courtney was appointed agent of the plaintiff for a definite time, and the obligation of Brown was to stand as his surety during that time, he could neither revoke the contract nor would he be entitled to a release without consent of the plaintiff. And the same would be true with respect to a contract to become surety for the performance of any definite contract, such as the erection of a building or the administration of an estate. But this was a contract to become surety for any liability which might thereafter in any manner exist or be incurred on the part of Courtney to the plaintiff. Although technically a contract of suretyship, it is governed by the same rule as a continuing contract of guaranty under section 2815 of the Civil Code. That section provides as follows: "A continuing guaranty may be revoked at any time by the guarantor, in respect to future transactions, unless there is a continuing consideration as to such transactions which he does not renounce." A continuing guaranty is defined to be, "A guaranty relating to a future liability of the principal, under successive transactions, which either

continue his liability or from time to time renew it after it has been satisfied." (Civ. Code, sec. 2814.) This is an exact description of the legal effect of the contract here in question, although nominally a contract of suretyship. The reason of the rule is the same in one case as in the other, and it applies equally to both. The code itself provides that "a surety has all the rights of a guarantor." (Civ. Code, sec. 2844.) Therefore, as a surety upon a contract contemplating a future liability of the principal under successive transactions, he had a right at any time to revoke the contract with respect to liability upon any transaction which was not at that time begun. The provision relating to the renunciation of any continuing consideration has no application, because there was no consideration at all as to Brown, and as to Courtney the consideration was not continuing as to future independent transactions such as this in question. The consideration for the notes was the machines sold to Courtney at the time the notes were given, and that was the only consideration upon which Brown, if he had not previously revoked, could have been held liable as surety with respect to that particular transaction. The demand for a release, and the consent thereto by the plaintiff's agent, followed by the execution of the release, was certainly the equivalent of, and in substance was, a revocation of the contract by the surety, Brown. The fact that the authority of Forden was not in writing is immaterial, because no formal release was necessary in order to terminate the contract.

Some attempt is made to show that some of the machines for which the notes sued on were given, were in the possession of Courtney at the time the demand for release was made by Brown, and that therefore the liability sued on was one existing at the time of the revocation, and consequently was not affected thereby. This cannot be the case. Under the terms of the contract between Courtney and the plaintiff the machines in Courtney's possession at the time Brown demanded the release were not the property of Courtney, but the property of the plaintiff. The only liability of Brown at that time with respect to those machines was for the return of the machines to the plaintiff in good order and condition, if unsold, or for the proceeds thereof if Courtney should sell them as agent for the plaintiff under the contract then existing.

This liability, however, is not the one here sued on, and it was extinguished by the sale of the machines to Courtney. This sale was a future transaction with relation to which the contract of suretyship was revoked, and for which Brown could not be held responsible. After such revocation the plaintiff had no right to make an absolute sale of the machines on hand to Courtney and hold Brown liable on the bond for the price.

The judgment appealed from is affirmed.

Angellotti, J., and Van Dyke, J., concurred.

[S. F. No. 2863. Department One.—January 19, 1904.]

AMERICAN FIRE INSURANCE COMPANY OF PHILADELPHIA, Respondent, v. W. H. H. HART, Appellant.

FIRE INSURANCE—UNAUTHORIZED APPLICATION FOR POLICY—MEASURE OF DAMAGES AGAINST ASSUMED AGENT.—In an action by a fire-insurance company to recover damages from one who represented himself to be an agent of a mining company to procure insurance on its property, without having actual authority to do so, the mining company having refused to receive the policy or pay the premium, the measure of damages is not the amount of the unpaid premium on the policy, which had no validity, nor the excess of the premium over the actual cost of insurance, but merely the loss proximately caused to the insurance company by its actual expense in making, issuing, and delivering the policy.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William R. Daingerfield, Judge.

The facts are stated in the opinion.

Aylett R. Cotton, for Appellant.

There was no risk incurred by the policy, as it never took effect. (2 May on Insurance, 3d ed., sec. 4.) No damage was proximately caused by the alleged misrepresentation, and the premium was no measure of damage. No actual damage was

proved, and none can be recovered without proof. (*Morrison v. Lods*, 39 Cal. 381-388; *London etc. Fire Ins. Co. v. Liebes*, 105 Cal. 213.)

A. D. D'Ancona, for Respondent.

The agent, having no authority, was personally responsible for the premium contracted for by him. (Story on Agency, sec. 264; 2 Am. & Eng. Ency. of Law, p. 1124; *Hall v. Crandall*, 29 Cal. 570;¹ *Lander v. Castro*, 43 Cal. 497; *Wallace v. Bentley*, 77 Cal. 79.)

HAYNES, C.—The defendant appeals from the judgment, and also from an order denying his motion for a new trial.

The plaintiff is a corporation doing business as a fire-insurance company in this state. Its complaint in this action alleged, in substance, that the San Justo Mining Company is a corporation doing business in this state, having its principal place of business in San Francisco; that on December 12, 1898, the defendant requested the plaintiff to issue to said mining company a policy of fire insurance for the period of one year from noon of that date, in an amount not exceeding seventeen thousand dollars, upon certain property of which it was the owner; that at and before the time of making said request defendant represented to the plaintiff that he was the agent of said mining company, and was authorized by it to procure said policy for it, and agreed on its behalf that it would pay to plaintiff as the consideration and premium of said policy the sum of \$367.50; that relying upon said statement of the defendant, plaintiff issued said policy; "that defendant, as a matter of fact, was unauthorized by, and did not have authority from said San Justo Mining Company to procure or request the issuance of said policy, and defendant knowingly exceeded his authority in procuring the issuance thereof by plaintiff"; that said mining company has failed and refused to pay said money or any part thereof, and that by said acts of defendant plaintiff has been damaged in the sum of three hundred and ninety dollars, with interest from December 12, 1898, and prayed judgment therefor.

Defendant's demurrer to the complaint, for want of facts

¹ 89 Am. Dec. 64.

and for uncertainty, was overruled, and he thereupon answered, putting in issue all its allegations. Upon the trial the court found for the plaintiff that defendant requested the issuance of the policy; "that at and previous to the time of making said request defendant represented and stated to the plaintiff that he was the agent of said San Justo Mining Company and was authorized by it to procure said policy of it; that defendant agreed on behalf of said corporation that it would pay to plaintiff as the consideration and premium for said policy the sum of \$367.50 on said twelfth day of December, 1898; that defendant was, as a matter of fact, unauthorized by, and did not have authority from, said San Justo Mining Company, to procure or request the issuance of said policy, and defendant knowingly exceeded his authority in procuring the issuance thereof by plaintiff; that said San Justo Mining Company has failed and refused to pay said sum of \$367.50, or any part thereof; that by the aforesaid acts of defendant plaintiff was damaged in said sum of \$367.50."

The material questions in the case are raised by demurrer to the complaint, by the contention that the findings do not support the judgment, and by motion for a new trial upon the ground of the insufficiency of the evidence to justify the findings and errors of law occurring upon the trial. The principal questions presented are, however, whether the defendant incurred any liability, and, if so, what is the measure of his liability?

It is distinctly alleged and found "that defendant, as a matter of fact, was unauthorized by, and did not have authority from, the San Justo Mining Company to procure or request the issuance of said policy." Upon this allegation and finding it is clear that no liability upon or under the policy ever existed against the plaintiff, nor does it appear that any claim or liability upon it has ever been asserted, either by the mining company or the defendant or other person. It was a mere failure to effect a valid contract of insurance which would have entitled the plaintiff to receive from the mining company the amount of premium or charge for an insurance, and which, if valid, would have fixed upon the plaintiff the duty and liability to pay the amount of all

loss and injury by fire which might have accrued to the property of the mining company during the term of the policy. The policy being void, no risk or liability was created or existed against the plaintiff. It is not contended by the plaintiff that the defendant is liable to it for the sum of \$367.50 as a premium or consideration for an insurance of the property described in the policy, for the policy was void and no liability was created; but it is contended that plaintiff was injured to that amount, and is entitled to that sum as damages, because "its liability, its chances of loss were exactly the same as if Hart's act had been authorized." But the property of the mining company was not insured by the plaintiff. The mining company did not authorize the insurance nor ratify Hart's act, but insured its property in another company, and no risk was created against or incurred by the plaintiff, and it is conceded by plaintiff that its "damage is the value of the risk incurred." If no risk was incurred by the plaintiff it followed that no damages were suffered, or at least none that are alleged in the complaint or specified in the finding. If insurance companies could sell policies at their usual rates which justified their liability for the risk of loss, but which creates no liability for the loss, if it should occur, it would evidently be a safe and profitable business. The premium agreed to be paid bears no just relation to the injury suffered, and it is therefore not the proper measure of the plaintiff's damage.

Conceding, however, that the plaintiff would be entitled to some damage by reason of the representations, we are of the opinion that the finding on that point is not sustained by the evidence. The profit which the plaintiff would have made by reason of the excess of the premium over the actual cost of the insurance, in case of such a policy, is not the true measure of damage. The plaintiff simply failed to obtain the opportunity of issuing a valid policy and receiving the premium therefor. If the defendant had not made the representations as claimed, but had informed plaintiff of his want of authority, it by no means follows that the plaintiffs would have succeeded in finding the person who was authorized by the mining company to act in that behalf, and would have succeeded in inducing such person to pay the premium and accept the policy. The representations of the defendant were

therefore not the proximate cause of the failure to obtain the premium nor of the resulting loss of profit. The only proximate result of the representations shown was the issuance of a policy which was without legal force or effect, and the only loss proximately caused would be the actual expense to the plaintiff of making, issuing, and delivering the policy.

There was no evidence of such expense, and the finding that the plaintiff was damaged in the sum of \$367.50 is not sustained.

Our conclusions upon the question discussed render it unnecessary to discuss the alleged errors occurring in the rulings upon the questions of evidence during the trial.

The judgment and order appealed from should be reversed.

Gray, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

Angellotti, J., Shaw, J., Van Dyke, J.

[Crim. No. 1059. Department One.—January 19, 1904.]

THE PEOPLE, Respondent, v. JUAN CHUTNACUT, Appellant.

CRIMINAL LAW — TRIAL — CONTINUANCE — DISCRETION.—In a criminal case a motion of the defendant for a continuance of the trial for the absence of a witness rests very much in the discretion of the trial court; and it is only in a plain case of the abuse of such discretion that this court will interfere.

ID.—GRAND LARCENY—STEALING OF COW—ALIBI OF ALLEGED CONSPIRATOR—IMPEACHMENT.—Where the defendant was accused of grand larceny in the stealing of a cow, an affidavit for a continuance, stating that the prosecution claimed that the defendant, who is an Indian, and one Syvoymoit, with two other Indians, stole the cow, and that the defendant expected to prove by absent witnesses an alibi as to Syvoymoit, who was not a defendant, and was not being tried shows no materiality of the evidence, unless it be for purposes of conditional impeachment; and the court did not abuse its discretion in denying the continuance.

ID.—CHALLENGE TO JURY—ACTUAL BIAS.—Where a juror was challenged for actual bias against the defendant as an Indian, but the evidence in the record shows to the contrary, the challenge was properly denied.

ID.—APPEAL—REVIEW OF INSTRUCTIONS—INSUFFICIENT ARGUMENT.—It is not the duty of this court to look at instructions refused which are referred to merely by folios, and to examine sections of the code referred to merely by number to discover error, where the counsel for appellant will not take the time to point out the particular instructions refused upon which he predicates error and the law which he invokes to show error.

APPEAL from a judgment of the Superior Court of San Diego County and from an order denying a new trial. N. H. Conklin, Judge.

The facts are stated in the opinion.

Dadmun & Escobar, for Appellant.

U. S. Webb, Attorney-General, C. N. Post, Assistant Attorney-General, and W. B. Andrews, Assistant District Attorney, for Respondent.

COOPER, C.—Defendant was convicted of grand larceny, and appeals from the judgment and order denying his motion for a new trial. He claims that the court erred in denying his motion to postpone, in denying his challenge to a juror, and in regard to instructions given and refused. A motion for the postponement of a case on the ground of the absence of a witness rests very much in the discretion of the trial court. It is only in a plain case of abuse of such discretion that we would interfere. The affidavit on which the motion was based stated that two witnesses, named therein, had been subpoenaed and were not in attendance; that the evidence was claimed to be material, for the reason that the prosecution claimed that on the twenty-eighth day of February, 1903, at about six o'clock P. M., the defendant and one Syvoymoit, with two other Indians, stole the cow described in the information; that the defendant expected to prove by the absent witnesses that at the time of the alleged larceny Syvoymoit was at their house, some three or four miles distant from the place where the larceny was committed. In other words, the defendant

ANGELLOTTI, J., concurring.—I concur in the judgment. The affidavit for continuance did not show the materiality of the proposed testimony of the absent witnesses, so far as the charge against this defendant was concerned; the testimony of the juror Airhart was sufficient to sustain the finding of the lower court that he was qualified; and no error is apparent in the matter of instructions to the jury.

[Crim. No. 1036. Department One.—January 19, 1904.]

THE PEOPLE, Respondent, v. WILLIAM KEITH, Appellant.

CRIMINAL LAW—RAPE—INSTRUCTION—COMPLAINT OF WRONG—RULE OF EVIDENCE.—Where the defendant was accused of rape, and the testimony was uncontradicted that the prosecutrix made prompt complaint, it was proper to instruct the jury that "upon the trial of a defendant accused of the crime of rape, the fact that the prosecutrix made prompt and early complaint of the wrong and injury done to her person and to her character and chastity, is independent and original evidence, and is admissible, and may be received and considered by the jury in corroboration of her other testimony given in the case." Such instruction merely states a well-recognized rule of evidence, applicable generally in such cases, and does not inform the jury of the facts or testimony in the case, and is not objectionable as singling out the testimony of a particular witness for comment.

ID.—INSTRUCTION AS TO PROVINCE OF JURY—CONVICTION UPON TESTIMONY OF PROSECUTRIX.—An instruction to the effect that it is the province of the jury to determine the weight and credibility to be given the testimony of the prosecutrix "as of any other witness testifying in the case," and that "if such testimony creates in the mind of the jury a satisfactory conviction and belief beyond a reasonable doubt of the defendant's guilt, it is sufficient of itself, without other corroborating circumstances or evidence, to justify a verdict of guilty," is not objectionable, either as omitting to refer to a complaint of the prosecutrix, or as telling the jury that if they believe the prosecutrix they should convict.

ID.—REFUSAL TO INSTRUCT AS TO LESSER OFFENSES—INAPPLICABILITY TO EVIDENCE.—Where the evidence admitted of no doubt of the fact of sexual intercourse, which, if without consent, was rape, or, if with consent, included no offense within the crime charged, a re-

quested instruction that the jury might find the defendant guilty of less offenses specified, was properly refused as inapplicable to the evidence.

ID.—REASONS FOR REFUSAL OF INSTRUCTIONS.—It is not material what reasons were assigned by the judge for the refusal of requested instructions, if they were properly refused for any reason.

ID.—INSTRUCTIONS SINGLING OUT TESTIMONY OF WITNESS.—It is not error to refuse an instruction which singles out the testimony of a particular witness for comment.

ID.—REQUESTS EMBODIED IN CHARGE.—Requested instructions embodied in the charge of the court may be properly refused.

ID.—EVIDENCE—PHYSICAL CONDITION OF PROSECUTRIX—TREATMENT.—Where the prosecuting witness testified to a prompt complaint to her mother, the admission of further evidence by her relative to her physical condition at that time, and to treatment by her mother to relieve that condition, was not objectionable as telling about the facts of the complaint.

ID.—REMARKS OF COURT—CAUTION AGAINST ERROR.—Where the court in sustaining an objection made by the defendant, remarked, "I don't propose to have this case go up there, and be reversed again, if I can help it," the reasonable inference from the remarks is, that the court only desired to be right in his ruling and to avoid error or mistake therein, and though unnecessary, there is no prejudicial error in the remarks.

APPEAL from a judgment of the Superior Court of Yolo County. E. E. Gaddis, Judge.

The facts are stated in the opinion.

William S. Wall, for Appellant.

U. S. Webb, Attorney-General, and C. N. Post, Assistant Attorney-General, for Respondent.

CHIPMAN, C.—This is an appeal from the second judgment of conviction of defendant for the crime of rape. The verdict of guilty is not called in question otherwise than through alleged errors of law occurring at the trial.

1. The court instructed the jury as follows: "Upon the trial of a defendant accused of the crime of rape the fact that the prosecutrix made prompt and early complaint of the wrong and injury committed upon her person, and to her character and chastity, is independent and original evidence

and is admissible and may be received and considered by the jury in corroboration of her other testimony given in the case."

The objections urged are: 1. That the court "tells the jury that it is a fact that the prosecution made prompt and early complaint"; 2. That the court by the instruction "distinguishes between one part of her testimony and the other," by stating that it was a fact that she made prompt and early complaint; 3. Also, that the court told the jury that her testimony was "independent and original evidence"; and 4. That the instruction points out as the fact that "her chastity and character has received a wrong and an injury." The instructions states a well-recognized rule of evidence in this class of cases as applicable generally "upon the trial of a defendant"; it in no sense can be held to be equivalent to saying—"the fact as testified to by the prosecutrix that she made prompt complaint," etc., or that "it is a fact that the prosecutrix made prompt and early complaint." The evidence is uncontradicted that she did make such complaint, but we do not think the instruction informs the jury that the fact was as she testified. That the instruction is a correct statement of the law is held in *People v. Lambert*, 120 Cal. 170, and *People v. Wilmot*, 139 Cal. 103, and we can see no error in so informing the jury.

2. The court instructed the jury that it is their province to determine the weight and credibility "to be given the testimony of a female upon whom it is alleged in an information that a rape has been committed, and who testifies to the facts and circumstances of such rape as of any other witness testifying in the case. And if such testimony creates in the mind of the jury a satisfactory conviction and belief beyond a reasonable doubt of the defendant's guilt, it is sufficient of itself without other corroborating circumstances or evidence to justify a verdict of guilty of rape upon the trial of the case." The objection urged is, that the court singles out the testimony of the prosecutrix and tells the jury how much weight they are to attach to it, and that under this instruction the jury might have found the defendant guilty though the prosecutrix never made complaint to any person. So far as making seasonable complaint to some relative or friend is con-

cerned, it is not necessary to a legal conviction. This is but a circumstance in the case, and is received as corroborative of the testimony of the prosecutrix as to the criminal act itself. Failure to make prompt complaint might be in some cases a strong circumstance, if unexplained, contradictory of the prosecutrix, but not necessarily conclusive. The remaining objection is based upon the decision of this court in *People v. Johnson*, 106 Cal. 294, and *People v. Barker*, 137 Cal. 557. In those cases the instruction was as follows: "While it is the law that the testimony of the prosecutrix should be carefully scanned, still this does not mean that such evidence is never sufficient to convict; if you believe the prosecutrix, it is your duty to render a verdict accordingly." The chief objection to this instruction made by the court was, that it took from the jury the question of the intent with which the acts of the defendant were committed; that it might be true that defendant did all the acts testified to and not have intended to commit rape, and yet the jury were not at liberty under the instruction to so find. Both these cases were assaults with intent to commit rape. In the instruction now before us the jury are first told that it is within their province to determine the weight and credibility to be given the testimony of the prosecutrix who testifies to the facts as of any other witness, and in the second place that if her testimony creates in the minds of the jury a satisfactory conviction beyond a reasonable doubt of defendant's guilt it is sufficient without other corroborating circumstances. This is very far from telling the jury if they believe the prosecutrix they must find the defendant guilty. The jury are told that they must be convinced of defendant's guilt beyond a reasonable doubt, while in the cases cited the jury were told to convict whether the facts constituted guilt or not. Here the jury were fully instructed as to what must be proved, and how proved, before there could be a conviction, and if defendant's guilt was thus established beyond a reasonable doubt by the testimony of the prosecutrix, it would be sufficient. The instruction complained of is not open to the objections made to the instruction in the cases last above cited.

3. It is complained that the court refused to instruct that the jury might find the defendant guilty of rape, assault with

intent to commit rape, attempt to commit rape, battery and assault, and in fact instructed only as to the crime charged. The evidence in the case admitted of no doubt as to the sexual intercourse. If it was with the consent of the prosecutrix, there was no offense at all included in the crime charged; if it was without her consent and under the circumstances, it could have been nothing but rape. It was one thing or the other, and there was no evidence tending to reduce the offense. The court did not err. (*People v. Chavez*, 103 Cal. 407; *People v. Lopez*, 135 Cal. 23; *People v. Swist*, 136 Cal. 520.)

4. Defendant's instructions marked XI and XII were refused, and this is claimed to be error. In the first of these the court was asked to instruct the jury that the defendant was a competent witness and that the jury "are as much bound to consider the evidence given by the defendant in the case as that of any other witness, and to give it all the weight you believe it entitled to." The instruction was indorsed—"Refused, because the defendant did not testify." The second of these instructions was that "If, from all the testimony in the case, that of defendant included, there remains a probability of defendant's innocence, it is sufficient to raise a reasonable doubt of his guilt and to entitle him to a verdict of not guilty." Marked "Refused for the same reason as stated above." The defendant testified in the case, and the court no doubt inadvertently stated the ground of its refusal as it did. It is not material for what reason the instructions were refused; they did not go to the jury nor did the court's reasons indorse thereon. This court has held it not error to refuse an instruction which singled out the testimony of a particular witness for comment. (*People v. Patterson*, 124 Cal. 102; *Thomas v. Gates*, 126 Cal. 1; *People v. Arlington*, 131 Cal. 231; *People v. Lonnen*, 139 Cal. 634.) Instruction XX was general and applied to all witnesses, including defendant, and covered the point that the jury should "give such credit to each witness as, under all the circumstances, such witness seems to be entitled to." The case of *People v. Cowgill*, 93 Cal. 596, cited by appellant, does not sustain him. There the objectionable clause, stricken out by the court before the instruction was given, was in substance embodied in the in-

struction asked in this case. The instruction given as to the testimony of the prosecutrix (people's instruction, numbered XIX) first above noticed, involves an entirely different question than the one now before us, and was not amenable to the objection that it singled out a particular witness.

As to the instruction marked XII, the court instructed the jury with clearness and repeatedly to the same effect as asked by defendant, and hence defendant was not injured. That instructions given in substance need not be repeated has often been held here.

5. Error is claimed on the alleged ground that the court permitted the prosecutrix "to tell about the facts of the complaint." The testimony complained of did not relate to the particulars of the alleged rape or of the complaint made, but related to the physical condition of the prosecutrix at the time she complained to her mother shortly after the assault, and also related to certain treatment by her mother to relieve the condition in which the prosecutrix then was. We cannot see but that she was as competent a witness upon these facts as her mother or other person cognizant of them.

6. In sustaining defendant's objection to certain questions put to the prosecutrix by the district attorney, and referring to the decision of this court upon a point arising at the former trial the court remarked: "I don't propose to have this case go up there and be reversed again if I can help it." It is contended that "by this remark the court plainly told the jury that the court fully expected their verdict to be that of guilty" and "that the court wanted the defendant convicted." If such an inference could reasonably have been drawn by the jury from the remarks of the court, we might well presume that they were prejudicial, and therefore error; but we think counsel attribute unwarranted importance to this remark. Trial judges should always endeavor to so rule as to avoid reversal; for presumably they thus avoid error, and error is always to be avoided. A more reasonable inference to be drawn from the remarks is, that the court desired only to be right in his ruling, and meant no more than if it had said to counsel, "I wish to avoid making a mistake in my ruling, and will sustain the objection." The remarks

were unnecessary, but we can discover no prejudicial error in them.

It is advised that the judgment and order be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Angellotti, J., Shaw, J., Van Dyke, J.

[S. F. No. 2852. Department Two.—January 19, 1904.]

**CUTTING FRUIT PACKING COMPANY, Respondent, v.
D. J. CANTY, Appellant.**

CONTRACT FOR SALE OF PEACHES—FAILURE IN DELIVERY—ACTION FOR BREACH—DAMAGES—SUFFICIENCY OF COMPLAINT.—A complaint for damages for breach of a contract to sell and deliver four hundred tons of peaches at thirty dollars per ton, which alleges the execution of the contract, and sets forth a copy thereof, and shows the breach of the contract by refusal to deliver two hundred and seventy and one half tons thereof, and shows damages sustained by the plaintiff in being compelled to pay twelve dollars per ton more than the price at which the defendant agreed to furnish the peaches, sufficiently states a cause of action.

ID.—WAIVER OF GROUNDS OF SPECIAL DEMURRER—AMBIGUITY REMOVED BY FINDING—SUPPORT OF JUDGMENT.—Where there was no special demurrer to the complaint, any grounds thereof must be deemed waived; and any variance between the terms of the contract, as alleged in the complaint, and those of the copy attached thereto was only an ambiguity or uncertainty, which was removed by the finding that the copy, as set forth in the complaint, is the contract into which the parties entered. Defective allegations in the complaint are cured by a verdict, and all intendments will be made in support of the judgment thereon.

ID.—FINDINGS—ABSENCE OF BILL OF EXCEPTIONS—PRESUMPTION UPON APPEAL.—Where the facts found are sufficient to sustain the judgment, and are within the issue, in the absence of any bill of exceptions, it must be presumed upon appeal that the evidence presented in support of the findings was competent to establish the facts alleged, and was received at the trial without any objection, and was sufficient to sustain each of the facts found.

ID.—COUNTERCLAIM—REDUCTION OF PLAINTIFF'S CLAIM—OMISSION IN FINDING—PRESUMPTION—BURDEN UPON APPELLANT.—Where the court found that the defendant was entitled, by way of offset to the claim of the plaintiff, to a specified sum for other peaches sold and delivered to the plaintiff, being the peaches referred to in the counterclaim, and deducted such sum from plaintiff's damages, the omission of the court to make a specific finding as to a larger sum claimed in the counterclaim is not ground of reversal, where the record does not show that defendant offered any evidence in support of such larger sum. Error is not to be presumed; and it was incumbent on the appellant to cause the record to show that he was entitled under the evidence to the larger sum.

ID.—INTEREST—DELAY OF CLERK TO ENTER JUDGMENT—ENTRY NUNC PRO TUNC.—It is the duty of the clerk to enter judgment immediately when ordered by the court; and where the clerk delayed to enter judgment for nearly two years after the rendition, such delay will not be permitted to prejudice the defendant in the allowance of interest. The proper procedure to prevent such prejudice is for the superior court to correct the judgment by causing it to be entered *nunc pro tunc* as of the date when it should have been entered, with allowance of interest from the commencement of the action to that date, and interest on the judgment from that date.

ID.—CORRECTION IN SUPERIOR COURT—COSTS OF APPEAL.—The judgment should have been corrected by motion in the superior court; and where the only error appearing is an error of the clerk, and not of the court, the costs of appeal will be ordered to be paid by the appellant.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

Stanton L. Carter, for Appellant.

The complaint is to be taken most strongly against the pleader. (*Green v. Covillaud*, 10 Cal. 323;¹ *De Castro v. Clarke*, 29 Cal. 17; *Snow v. Halstead*, 1 Cal. 360; *Dickinson v. Maguire*, 9 Cal. 51; *Triscony v. Orr*, 49 Cal. 617; *Rogers v. Shannon*, 52 Cal. 107; *Collins v. Townsend*, 58 Cal. 614; *Hayes v. Steiger*, 76 Cal. 556; *Glide v. Dwyer*, 83 Cal. 481; *People v. Wong Wang*, 92 Cal. 277, 281.) And so taken, in this case, the complaint does not state a cause of action. (*Moore v. Besse*, 30 Cal. 572.) The complaint fails to allege that the purchase of peaches by plaintiff was made within the

time and in the market specified in section 3354 of the Civil Code. (*Bullard v. Stone*, 67 Cal. 477.) Interest was not allowable on unliquidated damages prior to judgment. (*Cox v. McLaughlin*, 76 Cal. 67;¹ *Swinerton v. Argonaut L. and D. Co.*, 112 Cal. 379; *Ferre v. Chabot*, 121 Cal. 236.) The judgment was binding from the date of its rendition. (*In re Cook*, 77 Cal. 232;² *Estate of Newman*, 75 Cal. 213.³)

Olney & Olney, for Respondent.

The complaint was good, and any defects therein are cured by answer, findings, and judgment. (*Shively v. Semi-Tropic Land and Water Co.*, 99 Cal. 259, 261; *Kreling v. Kreling*, 118 Cal. 420; *Burns v. Cushing*, 96 Cal. 669.) Interest was recoverable from the date of filing the complaint to judgment. (Civ. Code, sec. 3287; *Lane v. Turner*, 114 Cal. 396; *McFadden v. Crawford*, 39 Cal. 662; *Pacific Mutual Life Ins. Co. v. Fisher*, 106 Cal. 233; *Martin v. Ede*, 103 Cal. 162; *Schmidt v. Noonan*, 63 Cal. 371; *Furlong v. Cooney*, 72 Cal. 322.)

THE COURT.—The plaintiff and the defendant entered into a contract in writing May 26, 1897, by which the defendant sold to the plaintiff 400 tons of peaches, at \$30 per ton. to be delivered at railroad station in San Francisco during the season of 1897, for which payment was to be made by the plaintiff weekly and on acceptance of the peaches. After the contract had been entered into the market value of peaches rose from \$30 per ton to \$42 per ton, and the defendant, after delivering 129½ tons of the peaches, refused and failed to deliver any more. The plaintiff thereupon, after demand upon the defendant for their delivery, purchased the remaining 270½ tons, for which it was obliged to pay \$42 per ton. It seeks by this action to recover from the defendant as damages for the breach of his contract the difference between the contract price of the peaches and the amount it was compelled to pay for those which the defendant refused to deliver—viz., \$3,246. The cause was tried without a jury, and upon findings of fact in accordance with the claim of the plaintiff, judgment was rendered in its favor. The defend-

¹ 9 Am. St. Rep. 164.

² 7 Am. St. Rep. 146.

³ 11 Am. St. Rep. 267.

ant has appealed directly from the judgment upon the judgment-roll, without any bill of exceptions.

1. The complaint alleges the execution of the contract between the plaintiff and the defendant, setting forth a copy of the same; the breach of the contract by the defendant in its refusal to deliver a portion of the peaches; the damages sustained therefrom by the plaintiff, together with the manner in which such damage was caused,—viz., by being compelled to pay more than the price at which the defendant had agreed to furnish the peaches. This was a sufficient statement of a cause of action, and if the facts thus alleged were admitted by the defendant or sustained at the trial, the plaintiff was entitled to judgment.

The objections to the complaint urged by the appellant relate to the manner in which the facts are stated, and not to an entire absence of any material fact. These objections should have been presented to the superior court by a special demurrer, but as such demurrer was not interposed they must be deemed to have been waived. Any variance between the terms of the contract, as alleged in the complaint and as contained in the copy attached thereto, was only an ambiguity or uncertainty, which is removed by the finding of the court that the copy as set forth in the complaint is the contract into which the parties entered. Defective allegations in the complaint are cured by a verdict, and all intendments will be made in support of the judgment thereon. (*San Francisco v. Pennie*, 93 Cal. 465; *Kimball v. Richardson*, 111 Cal. 386; *Hughes v. Alsip*, 112 Cal. 587.)

The facts found by the court are sufficient to sustain the judgment, and are within the issues presented by the complaint. If the defendant had any objection to the evidence offered in support of the allegations of the complaint, either on the ground of variance or that the facts sought to be established were not pleaded with sufficient definiteness, it was incumbent upon him to make such objection at the trial. In the absence of any bill of exceptions it must be assumed that the evidence presented in support of these findings was competent to establish the facts alleged, and was received without any objection, and was sufficient to sustain each of the facts found.

2. In his answer the defendant admits the delivery by him of 129½ tons of peaches, and alleges that there is still unpaid therefor and due to him from the plaintiff \$20.96. He also sets up a counterclaim against the plaintiff for \$392.80 for peaches sold and delivered by him to the plaintiff. The court finds that the plaintiff paid the defendant for the 129½ tons of peaches delivered by him, and it also finds that "the defendant is entitled by way of offset to the claim of plaintiff to the sum of \$371.84, for other peaches sold and delivered by the defendant to the plaintiff and being the peaches referred to in the counterclaim set up by the defendant." Judgment is thereupon directed in favor of the plaintiff for the difference between \$371.84, the amount of defendant's counterclaim, and \$3,246, the amount of damage sustained by the plaintiff.

It is contended by the appellant that by reason of the failure of the court to make a finding of fact upon the issue presented by the counterclaim, the judgment must be reversed. It is a sufficient answer to this contention to say that the record does not show that the defendant offered any evidence in support of his counterclaim, and that, as a failure of the court to make a finding thereon would not justify a reversal (*Winslow v. Gohransen*, 88 Cal. 450; *Rogers v. Duff*, 97 Cal. 66; *F. A. Hihn Co. v. Fleckner*, 106 Cal. 95), its finding in his favor for a less amount than claimed must be held to be all that the evidence offered in support of his claim would justify. Moreover, this finding is a decision upon the issue in favor of the appellant, and it is a general rule that courts will not listen to a party who seeks the reversal of a judgment in his own favor, unless he can make it appear that the judgment should have been for a greater amount or a wider scope. Error is not to be presumed, and if the appellant would contend that the court should have found for his counterclaim a greater amount, it was incumbent upon him to cause the record to show that such finding was required by the evidence.

3. The court filed its findings of fact and conclusions of law January 27, 1899, in which judgment was ordered in favor of the plaintiff for \$2,874.16, with interest thereon, from the date of filing the complaint,—viz., February 24, 1898. The clerk did not enter the judgment, however, until January 12, 1901, at which time he entered a judgment in favor of the

plaintiff for \$3,454.26, that sum being the amount of the damages found by the court, together with interest thereon at seven per cent per annum from the date of the decision until the date at which the judgment was entered of record.

The court properly allowed the plaintiff interest upon the amount of damage sustained by defendant from the date of filing the complaint (Civ. Code, sec. 3287; *Pacific Mutual Ins. Co. v. Fisher*, 106 Cal. 224; *Lane v. Turner*, 114 Cal. 396); and the action of the clerk in adding the interest from the date of the decision to the entry of the judgment was correct. (Code Civ. Proc., sec. 1035; *Golden Gate Mill v. Machine Works*, 82 Cal. 184; *Barnhart v. Edwards*, 128 Cal. 575.)

4. In the judgment as recorded the clerk has written at its head, "January 27th, A. D. 1899," the date at which the decision was filed, and which upon the face of the judgment appears to be its date; and it is urged by the appellant that inasmuch as the judgment directs that plaintiff shall recover from the defendant the sum of \$3,454.26, with interest thereon at the rate of seven per cent per annum "from the date hereof till paid," the plaintiff will recover a greater amount of interest than he is entitled to receive. It clearly appears from an examination of the judgment-roll that the clerk computed the interest up to the date of the entry of the judgment, and that by the insertion of the words, "from the date hereof till paid," he intended to refer to the date of such entry. The prefatory date, "January 27th, A. D. 1899," is no part of the judgment, but was evidently intended only as a connecting link between the decision and the entry of the judgment. The date of the judgment is the date of its entry. These words, however, create an ambiguity on the face of the judgment which the appellant is entitled to have removed.

The superior court is therefore directed to cause the aforesaid prefatory date, "January 27th, A. D. 1899," to be expunged from the face of the judgment. In all other respects the judgment is affirmed. As the correction herein directed would have been made by the superior court upon a mere suggestion therefor, the costs of the appeal must be borne by the appellant.

A petition for a hearing in Bank was filed, and the following opinion was rendered thereon on the eighteenth day of February, 1904:—

THE COURT.—A rehearing of this cause is denied, but it is necessary to modify the order of the Department remanding the cause with directions in relation to the amendment of the judgment as entered by the clerk.

The facts stated in the Department opinion show that the clerk neglected to enter the judgment for nearly two years after its rendition, and then included interest from the filing of the complaint till the date of entry (less about fifteen dollars, which we suppose was owing to a mistake in the calculation). The result of this action on the part of the clerk is to charge the defendant with compound interest on the amount due when he was liable for simple interest only. This may be shown by the following example: A judgment is rendered to-day for one thousand dollars. It is the duty of the clerk to enter it immediately. If he does so it will at the end of five years from the date of rendition amount, with interest at seven per cent, to \$1,350. But if the clerk neglects for two years to enter the judgment, and then includes the interest computed from the date of rendition (one hundred and forty dollars), there will be a judgment for \$1,140—which, at the end of three years from that date (five years from date of rendition), will amount, with interest at seven per cent, to \$1,379.40, or \$29.40 more than the true amount for which the defendant is liable. The neglect of the clerk to enter the judgment when he ought to enter it cannot be permitted to have this injurious consequence, which can only be corrected by causing the judgment entry to bear the date it ought to have borne,—i. e., the day of, or the day after its rendition,—so that it will draw interest from that date. In this case the proper amount of the judgment is to be ascertained by adding to the sum found due at the date of the commencement of the action (\$2,874.16), interest up to the date it should have been entered (January 27, 1899), which amount will bear interest from that date.

We reaffirm what was said in the Department opinion as to the costs of the appeal. The superior court committed no error calling for a reversal or modification of the judgment

The only error found in the proceedings was an error of the clerk. There is no necessity to prosecute an appeal to this court on account of the clerk's mistake unless the superior court refuses on proper motion to correct them, in which case the court's action, not the clerk's, will be brought up for review.

The cause is remanded, with directions to the superior court to cause the judgment to be entered *nunc pro tunc* as of January 27, 1899, for the amount found due at the commencement of the action, with interest to that date. As so amended the judgment is affirmed, costs of appeal to be paid by appellant. This order to take the place of the Department order.

[S. F. No. 2821. Department One.—January 20, 1904.]

JOHN P. GALLAGHER, Appellant, v. EQUITABLE GAS LIGHT COMPANY, Respondent.

GAS COMPANY—CONTRACT FOR CONTINUOUS RATE—OSTENSIBLE AGENCY—KNOWLEDGE OF COMPANY.—Where a contract for the supply of gas by a specified rate by the corporation defendant to the plaintiff would not be entered into by plaintiff unless the defendant agreed to supply gas at that rate so long as it was used in plaintiff's hotel, and the agent of defendant seeking to obtain the contract modified it accordingly, whereupon plaintiff signed it, and it was delivered to the company without actual information to it of such modification, such agent had ostensible, if not actual, authority to modify the contract, and the defendant, which received the contract as so modified, must be charged with knowledge of all of its provisions, of which it had the means of knowledge, though it carelessly and negligently deprived itself of such means by filing away the contract without noticing the modification, which was distinctly legible.

ID.—NEW PROPOSAL—RATIFICATION OF MODIFICATION.—If the change made by defendant's agent to suit the plaintiff may be regarded as a rejection of the contract as originally proposed by defendant to plaintiff, and as a new proposal by plaintiff, the voluntary acceptance of the proposal by the defendant, and its action under it, constituted a contract binding upon the defendant.

ID.—VALIDITY OF CONTRACT AS MADE—CONSIDERATION—MUTUALITY.—Where it appeared that the plaintiff agreed to take gas from the

of San Francisco, and prior to November 9, 1899, he lighted said hotel by electricity; that on that day defendant persuaded him to discontinue the use of electricity and use gas, to be furnished by defendant instead thereof; that he expended considerable money in supplying gas-fixtures, induced thereto by the agreement of defendant to furnish plaintiff gas for said hotel at a price not to exceed sixty-five cents per thousand cubic feet "while the same was used in said Hotel Langham." There are also allegations as to irreparable injury and inadequacy of remedy at law. Prayer that defendant be "required faithfully and honestly to carry out its contract with plaintiff, . . . and for that purpose a decree of this court be entered, ordering the defendant to furnish gas to this plaintiff so long as plaintiff will continue to operate and use the same in said Langham Hotel, provided, however, plaintiff shall pay or tender to defendant sixty-five cents per thousand cubic feet for all gas used by him in said hotel. That defendant be restrained . . . from discontinuing furnishing gas to the plaintiff" for use as above and so long as plaintiff shall pay for same as above, and for other and further relief. Defendant denies the allegations of the complaint, and as further answer alleges an agreement in writing of the date of November 9, 1899, between plaintiff and defendant whereby defendant agrees to supply said hotel one hundred and ten incandescent lamps, complete with chimneys, shades, and mantles, and one hundred and fifty open-tipped burners, and "place the said lamps and burners upon fixtures to be designated by the said John Gallagher [plaintiff], it being understood that the only charge to be made by the party of the first part [defendant] at the time of the installation of the above-mentioned lamps and tips is to be a charge of twenty cents for each and every mantel so installed"; that title in the lamp and tip-burners was to remain in defendant, and plaintiff "shall give them [defendant] timely notice in case of discontinuance of the gas or removal, so that the Equitable Gas Light Co. may remove said lamps and tips from said premises"; that said party (plaintiff) "agrees to take from the party of the first part [defendant] gas for use in said Langham Hotel and on said premises, and pay therefor at the rate of sixty-five cents per thousand cubic feet, . . . whenever the said . . . company shall present the

bills for same"; also, that he agreed to comply with the rules of defendant and allow its employees free ingress to the pipes and meters. It is averred that this is the only agreement entered into, but that after said agreement had been signed by defendant there was indorsed upon the same, without the knowledge or consent of defendant, a clause as follows: "The party of the first part agrees that the price of said gas sold to the party of the second part shall not exceed the price of sixty-five cents per thousand cubic feet while in use in said Hotel Langham." It is further averred that defendant's regular rates for gas prior to May, 1899, was one dollar per thousand cubic feet, and that after said date it reduced the rate to sixty-five cents per thousand cubic feet, and that price was in force on November 9, 1899, and continued until April 1, 1900, "at which time defendant increased the price of gas to all its customers to one dollar per thousand cubic feet," at which rate plaintiff was requested to pay after said date but plaintiff refused to do so, and thereupon, and not otherwise, defendant threatened to discontinue serving plaintiff with gas in said hotel; denies refusing to furnish gas to plaintiff provided he pay the rate charged all defendant's customers.

The court found against plaintiff on his allegation that defendant agreed to furnish gas at the price named so long as plaintiff might use it in said hotel; it also found that about May 14, 1900, defendant demanded from plaintiff pay for gas on and after April 1, 1900, at the dollar rate, which defendant refused to pay, and refused to pay any higher rate than sixty-five cents. The court, in effect, found that the provision indorsed on the written contract after it was signed by defendant was not executed by defendant and was not its agreement. Judgment passed for defendant accordingly. Plaintiff appeals from the judgment and from the order denying his motion for a new trial.

The only witnesses were plaintiff, E. F. Cheffens, solicitor and collector of defendant, and S. H. Tacy, secretary of defendant. Cheffens testified that he went to plaintiff in November, 1899, to solicit his custom, and showed him the usual form of contract; that plaintiff was not satisfied with the form and wished further time to consider the matter; witness went back once or twice; "and explained just what

would have to be done"; that a special contract was drawn up; witness brought to plaintiff the contract in question, bearing the signature of defendant by Tacy, secretary, with the company seal attached. Plaintiff testified that he objected to the contract because it contained no clause, which plaintiff had previously insisted upon, relating to the price remaining at sixty-five cents per thousand cubic feet, and that Cheffens said: "I will have to put that in for you," and thereupon wrote the word "over," which appears near the bottom of the first page and at the left of the company signature, and also wrote the clause above quoted, which appears on the next page of the contract. Plaintiff testifies that he did not sign until after this indorsement. Cheffens testified: "When I first went to see Mr. Gallagher I carried him a printed contract which I left him to look over. I saw him again and he said that he was willing for the company to put in its gas, and that it was to be sixty-five cents for the whole time it was there. I do not remember how many times I visited Mr. Gallagher; I do not remember the general purport of any conversation. I do not remember that he would take it if we furnished it continuously for sixty-five cents per thousand cubic feet; I do not deny it; I do not affirm it. My recollection on that point is indistinct."

"Q. You swear positively that you wrote this in Mr. Gallagher's presence after the contract was signed by him?

"A. Not by him, but by the company, and the seal of the company was on it.

"Q. But he signed it after you wrote that, did he not?

"A. That I do not remember."

He testified that he took the contract, when signed, back to Secretary Tacy, and laid it on his desk, but did not call his attention to the change made in it. Tacy testified: "When Mr. Cheffens returned the contract to the office, it was then that I examined it and placed it in the safe, and it stayed there until Mr. Gallagher came to the office in April. I am general custodian of all the papers and records of the company, and all the contracts come there. It is my duty to look over all contracts. I do not know that it is my duty to pass upon them, but if a contract has been signed and delivered, and it is necessary for me to do anything of that kind to it, I nat-

urally see that I have done my part and file it away." In explaining what he did he said: "I opened it to see if Mr. Gallagher's signature was there, and then I put it in the vault. I unfolded it in this manner [indicating], and saw Mr. Gallagher's signature, and folded it back in this way [indicating], and put in the envelope, where we keep contracts, and put in the safe." Further explaining, he said: "I opened it and had my thumb on the word 'over' and did not see it." Cheffens testified: "Immediately to the left of John P. Gallagher's signature, about one-half an inch distance was the word 'over' written in a plain, bold, distinct, and perfectly legible handwriting. On the back or reverse side of the same sheet of paper about one quarter of the way down the page was written, in the same plain, bold, distinct, and perfectly legible handwriting the following clause" (the clause in question). It is undisputed that it was in this condition when delivered to plaintiff and to Secretary Tacy. Cheffens testified that he "had charge of and solicited contracts generally with everybody and anybody for the company, never made any special contract like this one. We had a simple form which the consumers would sign and I would hand it in to the company. Would carry around a contract for sixty-five cents and get people's signatures to it, and would hand it in to the company."

I think the evidence shows that Cheffens was the ostensible if not the actual agent of defendant in this matter. (Civ. Code, secs. 2316, 2317, 2330.) I think, also, that defendant must be charged with knowledge of all the provisions of the contract, because it had the means of such knowledge, of which it carelessly and negligently deprived itself. (Civ. Code, secs. 2330, 2332; *Merrill v. Pacific Transfer Co.*, 131 Cal. 582; *Shain v. Sresovich*, 104 Cal. 405.) If, as is argued, Cheffens was not defendant's agent with authority to make the contract, it became all the more incumbent on Secretary Tacy to examine the contract for himself, and his dereliction in failing to do so only re-enforces the reasons for holding that defendant is charged with knowledge of the contract acted upon by both parties. If the change made by Cheffens to suit plaintiff may be regarded as a rejection of the contract as originally proposed to plaintiff and as a new proposal by

plaintiff, the voluntary acceptance by defendant of this proposal and its acting under it would constitute it a contract binding upon defendant. (Civ. Code, secs. 1584, 1589; *Bloom v. Hazzard*, 104 Cal. 310.) We think the objection that the findings in these particulars are not supported by the evidence is well taken.

Respondent objects that the time clause of the contract is void for want of mutuality; that if it can be construed as an obligation by defendant to furnish gas for a definite period of time, it is void because plaintiff does not agree to take gas for such a definite period, and for like reasons the time clause is void for uncertainty. It is also claimed by respondent that the contract cannot be specifically performed because not mutual, and if it cannot be specifically performed injunction will not lie. These several points may be considered together. Under section 629 of the Civil Code a corporation supplying gas "Upon the application in writing of the owner or occupant of any building . . . must supply gas as required for such building," and by section 632 of the same code it is provided that the corporation "may shut off the supply of gas from any person who neglects or refuses to pay for the gas supplied." In *Capital Gas Co. v. Young*, 109 Cal. 140, the court said: "Under section 629 of the Civil Code the respondent was bound, upon proper demand, to furnish gas to the city. . . . Under the operation of this law the gas company was not a free agent with power to contract or refuse to do so, but it became its duty, upon demand, to furnish gas to the city irrespective of the *status* of its president. This duty to furnish gas to the city devolved upon the respondent, not by virtue of any contract, but by operation of the law, and hence the law governing ordinary contracts resting on the volition of the parties has no application." In *Visalia Gas etc. Co. v. Sims*, 104 Cal. 326,¹ where the company undertook to free itself from the responsibility of operating its plant by leasing it to one Lynch, the court said: "That plaintiff having availed itself of the franchise granted it by the city of Visalia, it became its legal duty to operate its gas and electric works, and to supply the inhabitants with gas and electricity," and could not lease its works to Lynch.

¹ 143 Am. St. Rep. 105.

The evidence is, that defendant's mains run through the streets within less than one hundred feet of plaintiff's hotel; that plaintiff was solicited by Cheffens, who urged defendant to discontinue lighting the hotel with electricity and take defendant's gas, and plaintiff told Cheffens if he took the gas it was to be sixty-five cents for a thousand cubic feet "for the whole time it was there"; that after the contract was signed the electric lamps, meters, etc., were taken out, and the use of electricity discontinued, and defendant's appliances were substituted.

Plaintiff testified: "I paid out considerable money for some of the fixtures," and the contract required him to pay twenty cents each for mantles, and both parties acted under the contract from November until the following April, when defendant notified plaintiff of the raise in price. By the terms of the contract plaintiff "agrees to take from the party of the first part gas for use in said Hotel Langham, and on said premises, and to pay therefor at the rate of sixty-five cents per thousand cubic feet," and defendant "agrees that the price of gas sold to the party of the second part shall not exceed sixty-five cents per thousand cubic feet while in use in said Hotel Langham." Plaintiff took the gas under the contract, and still desires to take it, and has faithfully kept his agreement; he discontinued the use of electricity, and prepared for the use of gas at some considerable expense. These facts show consideration. There was a mutual exchange of promises—promise for promise—which will support each other, unless one or the other is void. (*Siddall v. Clark*, 89 Cal. 321.) The contract was mutually performed for several months, and was in course of execution when the suit was brought. By bringing the action plaintiff put himself under the obligation of the contract. (*Sayward v. Houghton*, 119 Cal. 545; *Spires v. Urbahn*, 124 Cal. 110.) We do not think it was necessary to mutuality that the contract should name a definite period of time for its continuance. It is unlike the case of an offer to sell personal property at a stated price where the buyer does not agree to purchase or bind himself at all, as in the cases cited by respondent. Nor do we construe the action as being essentially one for specific performance, except as it incidentally seeks to enforce plaintiff's rights in the premises. (*Sayward v. Hough-*

ton, 119 Cal. 545.) There can be no question that the intention was that plaintiff would take gas from defendant, for he expressly agreed so to do, and that defendant should supply it at the rate agreed upon, as long as plaintiff should use it, for defendant so expressly agreed, and so long as plaintiff took the gas defendant could compel payment at the agreed rate. It was indeed not necessary that defendant should agree to supply the gas, for this was its duty under the statute. It could only fix the rate and enforce reasonable regulation as to the service. The obligation of defendant to supply property-owners within the statutory limits of defendant's mains, as we have seen, results from the statute, and not from contract. The provisions of section 632 of the Civil Code imply that the gas corporation cannot shut off the supply of gas so long as the consumer does not refuse or neglect "to pay for the gas supplied . . . by the corporation, as required by his contract." The contract being shown, and plaintiff having complied fully with its terms, and averring readiness to continue to take gas and ability to pay for it, injunction will lie. (*Sickles v. Manhattan Gas Light Co.*, 64 How. Pr. 33; *Xenia Real Estate Co. v. Macy*, 147 Ind. 568; *Mackin v. Portland Gas Co.*, 38 Or. 120.) In this latter case it was stated: "The right of a court to compel by *mandamus* a company engaged in furnishing gas for general consumption to supply all persons along its mains or conduits who offer to and do comply with its rules and regulations is undoubted and unquestioned." (Citing cases.) The other two cases above cited are proceedings by injunction. In *Sickles v. Manhattan Gas Light Co.*, 64 How. Pr. 33, the action was to have the amount due the company ascertained, and that the company be restrained from removing the meter or cutting off the supply of gas. It was held that when a dispute arises between the company and a consumer the latter is entitled to have his rights investigated by the courts, and that an injunction will be granted to prevent the cutting off of the supply of gas until the cause can be tried. In that case it did not appear that there was any contract as to the rate, and presumably the rate was that charged generally to customers, and there was no agreement to take the gas for any specified time. The contract in all such cases is, that the consumer shall pay the usual rate so long as he uses the

gas. There can be no difference between such a case and one where the company has agreed with a consumer as to the rate in his particular case. In enforcing such a contract in the case of a gas corporation operating under such a statute as ours, it is not an action for specific performance in strict sense. If injunction would lie in the Sickles case, it will also lie in the case here. The subject is quite fully discussed in *Xenia Real Estate Co. v. Macy*, 147 Ind. 568. *Whiteman v. Fuel Gas Co.*, 139 Pa. St. 492, is cited, where the court held that a mandatory injunction would be awarded at least to restore the *status quo*. In both these cases there was consideration shown for the agreement to take gas, and the companies agreed to furnish the gas at a rate fixed by the contract, but in neither of them did the consumer agree to take the gas for any definite period of time. There was a definite period within which the gas companies agreed to supply gas, but no express agreement that the consumers should take gas for that or any definite period. It was urged that specific performance could not be enforced, and therefore injunction would not lie. But it was held that this contention could not be maintained. It was also held in this class of cases that there was no complete and adequate remedy at law. So held, also, in the Sickles case, 64 How. Pr. 33.

The judgment and order should be reversed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

Shaw, J., Angellotti, J., Van Dyke, J.

Hearing in Bank denied.

[S. F. No. 2329. Department One.—January 20, 1904.]

**EMMA C. BAKER, Appellant, v. SAN FRANCISCO GAS
AND ELECTRIC COMPANY, Respondent.**

**GAS COMPANY—ACTION UPON PENAL STATUTE—LIQUIDATED DAMAGES—
DEBT FOR GAS UNEXTINGUISHED—REFUSAL OF TENDER.**—An action under section 629 of the Civil Code to recover from a gas company liquidated damages for failure to supply the plaintiff with gas, is based upon a penal statute, and plaintiff must show a strict compliance with its terms, by payment of all money due the gas company, or, if it refuses to receive it, by extinguishment of the debt by deposit of the money to the credit of the gas company, and notice thereof, as provided in section 1500 of the Civil Code. The action cannot be sustained by mere proof of a tender of the money and refusal of the defendant to receive it, without such extinguishment of the debt.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion.

Van Ness & Redman, for Appellant.

Bishop, Wheeler & Hoefler, and William Rix, for Respondent.

GRAY, C.—This action was brought to recover five hundred and thirty dollars as liquidated damages under section 629 of the Civil Code, for refusal and neglect of defendant to supply plaintiff with gas from January 9, 1900, to April 9, 1900. The defendant had judgment and plaintiff appeals.

The case was tried upon an agreed statement of facts, which is made the findings in the case by stipulation between the parties. So far as necessary to this opinion, these facts are as follows: Plaintiff formerly resided at 124 Fulton Street, San Francisco, and there took gas of defendant after depositing with it five dollars in advance and receiving in return a receipt as follows:—

“Received from E. C. Baker, five dollars as deposit in advance for gas to be used at premises No. 124 Fulton Street.

This deposit is only to be refunded upon the surrender of this certificate at final settlement. The regular bills of the company must be promptly paid without reference hereto.

"For the Company, W. KEEGAN."

Plaintiff moved from Fulton Street October 20, 1898, to 301 Grove Street in said city, owing \$3.85 for gas used at the Fulton-Street house. Plaintiff continued to take gas of defendant at the Grove-Street house, and on December 22, 1898, defendant presented to her a bill for \$2.45 for gas used at the Grove-Street house and also a bill for \$3.85 for the gas consumed on Fulton Street. The plaintiff thereupon offered to pay the \$2.45 for gas used on Grove Street, and offered to surrender to defendant the aforesaid receipt for the five-dollar deposit, and authorized defendant to deduct from said deposit said sum of \$3.85 due for gas used on Fulton Street. The defendant refused so to do, and notified plaintiff that unless the sum of \$6.30 was paid to it before noon of January 13, 1899, defendant would discontinue supplying said building on Grove Street with gas. Plaintiff failed to comply with this notice, and the gas was accordingly shut off by defendant. On January 20, 1899, plaintiff, in writing, demanded of defendant that gas be supplied for the Grove-Street house, but defendant refused to do so, and continued to refuse during the time involved in this action.

The section 629 of the Civil Code, upon which this action is based, reads as follows:—

"Upon the application in writing of the owner or occupant of any building or premises distant not more than one hundred feet from any main of the corporation, and payment by the applicant of all money due from him, the corporation must supply gas as required for such building or premises, and cannot refuse on the ground of any indebtedness of any former owner or occupant thereof, unless the applicant has undertaken to pay the same. If, for the space of ten days after such application, the corporation refuses or neglects to supply the gas required, it must pay to the applicant the sum of fifty dollars as liquidated damages, and five dollars a day as liquidated damages for every day such refusal or neglect continues thereafter."

The agreed statement shows that the house was within a hundred feet from the defendant's main, that the applica-

tion in writing was given as required by the statute, and ten days elapsed and no gas was furnished by defendant.

The action being based upon the statute, which is penal in its nature, strict compliance with its provisions must be shown by plaintiff to entitle her to the remedy provided by its terms. It is conceded that there was no actual payment of the amount due for gas used at the Grove-Street house, but it is urged by plaintiff that payment was waived and excused by plaintiff's tender of the money and defendant's refusal to accept it. We do not think payment was excused because of the refusal to accept the money so as to give a right of action under the statute already quoted. The complaint alleges that at the time the gas was shut off and demand to continue the same was made, the plaintiff was not indebted to the defendant. This could not be true unless the obligation to pay for the gas previously supplied to the Grove-Street house had been extinguished. If upon the refusal to accept the tender, plaintiff had deposited the money with a bank to the credit of defendant, she would have thereby "extinguished" the obligation, and perhaps there would then have been no indebtedness remaining as is contemplated by section 629 of the Civil Code. Section 1500 of the Civil Code provides: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank or deposit within this state, of good repute, and notice thereof is given to the creditor." Nothing short of a compliance with this section can be held to constitute payment, or to extinguish the debt so that payment would be unnecessary within the meaning of the section upon which this action is based, for it will be seen that the latter section 629 of the Civil Code does not give the right of action to a party upon waiver of payment or when the payment is excused merely, but only on and after what may be treated in law as an actual payment of the amount *due* the defendant does this right arise to recover the penalty provided by the statute. The facts set forth in the agreed statement fail to meet the requirements of the law, because they do not show either actual payment for the gas at the Grove-Street house, or what might be held to be the extinc-

tion of the debt merely, a compliance with section 1500 of the Civil Code.

We advise that the judgment be affirmed.

Chipman, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Shaw, J., Angellotti, J., Van Dyke, J.

Hearing in Bank denied.

[S. F. No. 3285. Department One.—January 20, 1904.]

CALIFORNIA CURED FRUIT ASSOCIATION, Respondent, v. F. E. STELLING, H. G. STELLING and JOHN STELLING, Appellants.

CLAIM AND DELIVERY—RIGHT OF POSSESSION OF PRUNE CROP—CONTRACT FOR POSSESSION AND SALE—DELIVERY TO AGENT—RETAKEING BY DEFENDANTS.—Where the defendant brothers made a contract for the exclusive possession and right of possession of their prune crop by the plaintiff, which was to undertake the inspection, packing, and sale thereof for the highest obtainable prices, and delivered the crop to plaintiff's agent for packing on account of plaintiff, and afterward retook the possession thereof, the facts show that the plaintiff had the possession and right of possession of the prunes when so retaken, and had the right of possession under the contract at the time of the commencement of an action for claim and delivery of the prune crop.

1D.—RIGHT OF PROPERTY—DUTY OF PLAINTIFF TO ACCOUNT.—The right of possession of the plaintiff under the contract did not carry with it the right of property; and the plaintiff must comply with its contract, and account to defendants for the proceeds of sale of the prunes.

1D.—DEFENSE—TRANSFER TO CO-DEFENDANT—BONA FIDE PURCHASE NOT SHOWN—EQUITABLE INTEREST—SUBJECTION TO RIGHTS OF PLAINTIFF.—A transfer of the prune crop by the defendant brothers to a co-defendant, who was their father, does not entitle him to protection as a *bona fide* purchaser where there was no proof of the payment of purchase money therefor in good faith by the father, nor that he was without notice of all the facts; nor does the rule as to *bona fide* purchasers extend to the assignment of an equitable

interest. The defendant father stands in no better position than his co-defendants, who could only convey their rights subject to the contract rights of the plaintiff.

ID.—DEMAND BEFORE SUIT, WHEN UNNECESSARY.—Where the prunes taken by defendants from the possession of the plaintiff before suit, and transferred by them to their co-defendant, were, in the action of claim and delivery, demanded by them to be returned to such codefendant as owner, it is evident that a demand by the plaintiff upon the defendants for the possession of the prunes before suit would have been unavailing, and it was therefore unnecessary.

ID.—EVIDENCE—CONSIDERATION FOR TRANSFER—ABSENCE OF NOTICE NOT CLAIMED.—It was not error to exclude proof of a greater consideration than that expressed in the transfer where it was not claimed that the transferee bought without notice of the facts.

ID.—CONTRACTS WITH CORPORATIONS—COLLATERAL ATTACK UPON CORPORATIONS—ESTOPPEL.—Where the defendants made the contract with plaintiff and its agent as corporations, they will not be allowed by way of collateral attack to deny that they were such corporations.

ID.—VALIDITY OF CONTRACTS.—The defendants will not be allowed in the action for claim and delivery, which involves only the validity of the contracts so far as performed, and is not an action to enforce the contracts, nor to compel the performance of them, to raise questions as to whether they are in restraint of trade or against public policy. There is no question of public policy or restraint of trade in restoring the parties to the position in which they had by mutual agreement placed themselves.

ID.—RECOVERY OF POSSESSION—ERROR IN ALTERNATIVE JUDGMENT FOR VALUE IMMATERIAL.—Where the plaintiff gave a bond and retook possession of the prunes, and retained the same, the alternative judgment for value is immaterial, though for too large an amount.

ID.—CONTRACTS OF PARTIES—PUBLIC POLICY.—Parties should be careful about making contracts and creating agents, but when once made the courts will not relieve them for light or trivial reasons. Public policy is better served by leaving the parties and their rights to be measured by the terms of their contracts.

APPEAL from a judgment of the Superior Court of Santa Clara County and from an order denying a new trial. J. M. Seawell, Judge presiding.

The facts are stated in the opinion.

John B. Kerwin, for Appellants.

The contract is executory, and cannot be specifically enforced. (Civ. Code, secs. 3386, 3387.) One who has no title

except by contract with the owner, upon the performance of certain conditions, cannot maintain replevin. (*Cardinell v. Bennett*, 52 Cal. 476.) The contract was void as being in restraint of trade and against public policy. (*Pacific Factor Co. v. Adler*, 90 Cal. 110;¹ *Santa Clara etc. Co. v. Hayes*, 76 Cal. 387;² *Havemeyer v. Superior Court*, 84 Cal. 378;³ *Wright v. Ryder*, 36 Cal. 342;⁴ *Vulcan Powder Works v. Hercules Powder Co.*, 96 Cal. 510;⁵ *Herriman v. Menzies*, 115 Cal. 16;⁶ *Wasserman v. Sloss*, 117 Cal. 433;⁷ *United States v. Hopkins*, 82 Fed. 529; *United States v. E. C. Knight Co.*, 156 U. S. 16; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 331-334; *United States v. Joint Traffic Assn.*, 171 U. S. 567-592; *Addyston Pipe etc. Co. v. United States*, 175 U. S. 227-235; *Chesapeake etc. Fuel Co. v. United States*, 115 Fed. 610.) A demand was alleged but not proved, and, as the possession was lawful, a demand was necessary before suit for claim and delivery. (*Bacon v. Robson*, 53 Cal. 399; *Campbell v. Jones*, 38 Cal. 507.) John Stelling is entitled to be protected as an innocent purchaser for value. (Civ. Code, sec. 3440.) The plaintiff has no cause of action against John Stelling, who was no party to the contracts. (Civ. Code, sec. 3387.) The plaintiff was not entitled to recover more than its stipulated two per cent of the prunes, leaving defendants the owners of ninety-eight per cent. (*California Cured Fruit Assn. v. Ainsworth*, 134 Cal. 461; *Lambert v. McLeod*, 63 Cal. 162.)

Jackson Hatch, for Respondent.

The plaintiff had under the contract a superior and exclusive right of possession, which was sufficient to sustain the action. (Wells on Replevin, sec. 110.) Under the facts of the case no demand was necessary, the conduct of defendants being sufficient to show that it would be unavailing. (Wells on Replevin, sec. 345; *Cranz v. Kroger*, 22 Ill. 74; *Appleton v. Barrett*, 29 Wis. 21;⁸ *Seaver v. Dingley*, 4 Greenl. 307; *Smith v. McLean*, 24 Iowa, 337; *Newell v. Newell*, 34 Miss.

¹ 25 Am. Rep. 102.

² 9 Am. St. Rep. 211.

³ 18 Am. St. Rep. 192.

⁴ 95 Am. Dec. 186.

⁵ 31 Am. St. Rep. 242.

⁶ 56 Am. St. Rep. 82.

⁷ 59 Am. St. Rep. 209.

⁸ 9 Am. Rep. 534.

385; *Perkins v. Barnes*, 3 Nev. 557; *Homan v. Labor*, 1 Neb. 207.) The contract was not in restraint of trade. (*Herri-man v. Menzies*, 115 Cal. 16, 20.¹) Rights acquired under such a contract cannot be evaded. (*Havemeyer v. Superior Court*, 84 Cal. 378.²)

COOPER, C.—This action was brought to recover the possession of two hundred and twenty-five tons of dried prunes or the sum of \$17,543.14, the value thereof, in case a delivery cannot be had.

The case was tried before the court and findings filed, upon which judgment was ordered and entered in favor of plaintiff as prayed. Defendants bring this appeal from the judgment and order denying their motion for a new trial.

The defendants F. E. and H. G. Stelling (who will hereafter be called Stelling Bros.), in March, 1900, entered into a written contract with the plaintiff, which recited that, in consideration of the sum of one dollar and the further covenants contained in the contract, the said Stelling Bros., "has sold and transferred and does by these presents sell and transfer and set over to the said association an undivided interest equal to two per cent in his ownership or interest (free from all encumbrances) in and to all crops of green and cured prunes which shall be grown by or for him on the premises hereinafter described during the years 1900 and 1901,

. . . and the said association, in consideration of the sale and transfer to it of the said undivided interest, does by these presents promise and agree with the said first party to undertake the inspection, packing and sale of said entire crop, to establish and maintain uniform grades of fruits and nuts, as to size, condition and quality, and to procure such packing to be done in conformity therewith; also to make sale of such respective grades, under its own trademark and guarantee, and to make said sales as speedily as possible and for the highest obtainable prices. . . . Said association also agrees to advance and pay all expenses necessary in and about the inspection and packing of said crops and in storing and moving the same." The contract further provided that Stelling Bros. should cultivate and care for the said crop at their own

¹ 56 Am. St. Rep. 82.

² 18 Am. St. Rep. 192.

expense, and cure the said prunes to the satisfaction of plaintiff's inspector, and then deliver them to plaintiff, "said crop thereafter to be and remain at all times in and under the exclusive possession and control of said association." The contract further provided: "Said association shall have a lien upon said crops for a repayment to it of any and all moneys paid or advanced for storage, insurance, inspection, packing charges and commissions paid or allowed in connection with the sale of said crops." It was further provided in said contract that if Stelling Bros. "shall fail to deliver said crops as soon as picked and cured to the said association as hereinbefore provided, that the said association shall be entitled to assume and take exclusive possession and control of said crops."

On June 30, 1900, the plaintiff entered into a contract with the California Packers' Company, a corporation, by the terms of which the packers' company, among other things, was, as the agent of plaintiff, to receive, grade, and pack all the prunes of plaintiff. On July 28, 1900, the said Stelling Bros. entered into a contract with said packers' company, by the terms of which they leased to said company the warehouse and prune-packing plant in connection therewith. The lease provided that said Stelling Bros. were to remain in possession of said warehouse and prune-packing plant and conduct it, and the business in connection with grading and packing prunes as the agents and representatives of the said packers' company, the prunes to be so graded and packed being the prunes referred to in the contract made by plaintiff with the said packers' company.

The court found that said Stelling Bros., in accordance with said contract so entered into between them and the plaintiff on March 14, 1900, delivered to said California Packers' Company for the account of plaintiff the prunes in contest. This finding is supported by the evidence, which shows without conflict that the California Packers' Company was the agent of plaintiff for the purpose of receiving and packing the prunes; that the prunes when picked were hauled by Stelling Bros. and delivered to the California Packers' Company for plaintiff; that warehouse receipts were issued and delivered to Stelling Bros. for the prunes. We therefore conclude that

the plaintiff had the possession and the right to the possession, under its contracts, of the prunes at the time they were taken from its possession. It had the right to the possession at the time of the commencement of the action. Of course, the right to the possession does not carry the right of property, and the plaintiff must comply with its contracts and account to the defendants for the proceeds of the prunes. It appears that before the commencement of this action Stelling Bros. executed and delivered to their father, defendant John Stelling, a transfer of the prunes in the following language:—

“SAN JOSE, CALIF., Feb. 14th, 1901.

“For and in consideration of the sum of ten dollars and other good and sufficient considerations, we sell, assign and transfer to John Stelling all our right, title and interest in and to the following described personal property, to wit: 225 tons more or less of dried French prunes now in the warehouse upon the lands of said John Stelling; 6,000 50-lb. prune-packing boxes and all money that is now due or may become due us or either of us from the California Cured Fruit Association.

“Witness:

KARL KLEIN.”

“F. E. STELLING.

“H. G. STELLING.

It is claimed that, by virtue of the above writing, John Stelling became a *bona fide* purchaser for value of the prunes while they were under the control and dominion of Stelling Bros.

The court found that John Stelling never had nor claimed any interest in the prunes, except such interest as was conveyed to him by said writing, and that the only interest he now claims is the interest conveyed by said writing. The evidence supports the finding. John Stelling was a witness in his own behalf, but he did not testify that he paid anything for the prunes, nor that he was without notice of all the facts. He did testify that he had no interest in the prunes except the interest transferred by the writing. The writing states on its face that it conveys all the right, title, and interest in and to the prunes “and the money that is now due and to become due” from the California Cured Fruit Association. Of course, Stelling Bros. could convey their right, title, and interest in the prunes, which were rightfully in possession of

the plaintiff. The right and title of Stelling Bros. were subject to the right and title of plaintiff under its contract. By the transfer to John Stelling they only conveyed the right and title they had and no more. The rule as to *bona fide* purchasers does not extend to the assignee of an equitable interest. (*Hyde v. Mangan*, 88 Cal. 319.) The answer of a *bona fide* purchaser is in the nature of a new case founded on right and title set up to bar and avoid the plaintiff's title. To entitle a party to such protection he must prove the payment of the purchase money in good faith and without notice. (*Eversdon v. Mayhew*, 65 Cal. 167.) Here there being no proof as to the essential requisites necessary to make John Stelling a *bona fide* purchaser in good faith, we cannot presume that he was such. Hence as to John Stelling, he stands in no different or better position than his co-defendants.

It was not necessary for plaintiff to prove a demand before bringing suit. Defendants took the prunes from the possession of the plaintiff. They claim that John Stelling is the owner and demand a return of the prunes to him. Therefore, it is plain that a demand would have been unavailing. If the defendants had come rightfully into the possession of the prunes, and had never manifested any disposition to claim title to them, and had shown a willingness to surrender them, they could not be made to answer in costs without proof of a demand. But where a defendant sets up title or adverse claim to property in replevin it is not necessary to prove a demand prior to bringing suit.

Complaint is made that several findings are not supported by the evidence, but after careful examination we think that all the material findings are supported by competent evidence.

There was no error in sustaining plaintiff's objection to the question put to F. E. Stelling as to whether he received any other consideration from John Stelling except the ten dollars mentioned. If defendants proposed to show that the sale was not of a qualified title as the writing stated, but of the absolute interest, and that John Stelling bought for an adequate price and without notice of plaintiff's rights, they should have so informed the court. They never claimed that John Stelling bought without notice of the facts, and without proof of that fact, evidence of the adequacy of the price would

have been of no avail, even if it be conceded that the defendants could vary the terms of the bill of sale by parol evidence.

Other rulings are complained of, but we find none of sufficient importance to justify a reversal of the case.

Most of appellants' brief is devoted to arguing that plaintiff is not a legal corporation, and that the contract between Stelling Bros. and the plaintiff, and that between the California Packers' Company and plaintiff and Stelling Bros. are in restraint of trade, against public policy, and void.

Stelling Bros. having made the contracts with the plaintiff, and with the California Packers' Company, as corporations, will not be allowed by way of collateral attack to now deny that they were such corporations. (*Rondell v. Fay*, 32 Cal. 354; *Spring Valley Water Works v. San Francisco*, 22 Cal. 434; *Pacific Bank v. De Ro*, 37 Cal. 538; *Bakersfield Town Hall Assn. v. Chester*, 55 Cal. 98.) Nor will they be allowed in this proceeding to raise questions as to the contracts being in restraint of trade and against public policy in regard to matters not involved here. This is not an action to enforce the contracts nor to compel the performance of them. The contracts have been performed so far as the delivery of the prunes to plaintiff under them, and so far as giving the plaintiff the right to the possession of the prunes for the purposes of the contracts. Surely Stelling Bros. will not be allowed to make the contracts and to deliver their prunes under them for the purposes therein specified, and then to convert the prunes to their own use in disregard of the contract because there may, perchance, be some clause in the contract in restraint of trade. It is sufficient to say that the contracts are valid so far as performed. If there should be an attempt to enforce any part of the contracts which can be shown to be against public policy or in restraint of trade, then the court would declare such part void. The only penalty as to contracts in restraint of trade or against public policy is, that courts refuse to enforce them. (*Have-meyer v. Superior Court*, 84 Cal. 378;¹ *Continental Insurance Co. v. Board of Fire Underwriters*, 67 Fed. 310; *Steamship Co. v. McGregor*, 21 Q. B. Div. 544.)

Plaintiff's case is based upon its possession and right of its possession by reason of matters that occurred before the suit

¹ 18 Am. St. Rep. 192.

was brought. It seeks judgment for the purpose of placing it in the condition in which it was before the prunes were taken from it. There is no question as to public policy or restraint of trade in restoring the parties to the position in which they had by mutual agreement placed themselves.

In arriving at the conclusion herein stated we have not overlooked *California Cured Fruit Assn. v. Ainsworth*, 134 Cal. 461, which is easily distinguished from the case at bar. There the action was in trover, and not for the recovery of the prunes. The court, on familiar principles, held that as the plaintiff was only entitled as commission to two per cent of the value of the prunes, it could only recover a money judgment for its damages fourteen dollars. It could not be allowed to recover seven hundred dollars from defendant for the purpose of taking out fourteen dollars, and then repaying the balance, \$686, probably at the end of litigation. The courts do not countenance such circuitry of action.

In this case it appears that the plaintiff gave a bond and retook possession of the prunes. The alternative judgment for the value is therefore immaterial, although too large in amount. If it has not sold them or used due diligence to sell them in compliance with its contracts, the defendants have their remedy. If by their contracts and the placing of the prunes in the possession of the plaintiff and making it their agent to dispose of the prunes, they should lose money, the answer is, that the situation was brought about by the voluntary act of Stelling Bros. Parties should be careful about making contracts and creating agents, but when once made the courts will not relieve them for light or trivial reasons. Public policy is much better subserved in such cases by leaving the parties and their rights to be measured by the terms of their contracts.

It follows that the judgment and order should be affirmed.

For the reasons given in the foregoing opinion the judgment and order are affirmed. Shaw, J., Van Dyke, J.

Angellotti, J., concurred in the judgment.

Hearing in Bank denied.

[L. A. No. 1403. Department One.—January 21, 1904.]

W. H. HAY and D. A. VAN VRANKEN, Partners, Appellants, v. JOHN A. MASON, Respondent.

VENDOR AND PURCHASER—CONTRACT OF SALE—OPTION TO PURCHASE—EXCHANGE OF LAND—TENDER OF DEED—PRIOR WITHDRAWAL OF OPTION—ACTION FOR BREACH.—Under a contract for the sale of land, expressed to be for value received, and conferring an irrevocable option to purchase within fifteen days, and good thereafter until withdrawn, the consideration of which was in fact an oral agreement for the exchange of land, where it appears that the tender of the deed in exchange for the land described in the option was not made until after the lapse of the fifteen days, and until after notice of withdrawal of the option by the vendor, the proposed purchasers cannot thereafter maintain an action for damages for breach of such contract.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. M. T. Allen, Judge.

The facts are stated in the opinion.

R. L. Horton, for Appellants.

Johnstone Jones, for Respondent.

COOPER, C.—This action was brought to recover damages for breach of contract to convey real estate. The case was tried before the court, findings filed, and judgment entered for defendant. This appeal is from the judgment and the order denying plaintiff's motion for a new trial.

On November 19, 1901, defendant executed and delivered to plaintiffs a writing, of which the following is a copy, to wit:—

“OPTION TO TRADE.

“For value received I hereby agree to sell and convey to Hay & Van Vranken, or his assigns, by a good and sufficient deed of grant, bargain and sale, with the usual covenants free and clear of all liens and encumbrances, all of the following described property, to wit: being lot ten (10) of Embody and Lacy's Sub., of block nine (9) of East Los Angeles,

as per map recorded in Book five (5), page 586, Miscellaneous Records of said County and State. . . . This option to be irrevocable for fifteen (15) days and good thereafter until withdrawn.

"In witness whereof I have hereunto set my hand and seal this 19th day of November, 1901.

(Signed) "JOHN A. MASON.

"Witness to signature, JOHN F. WHITE."

No money was paid to defendant, and no price in money was to be paid, but there was an oral agreement that the lot described in said writing should be conveyed to plaintiffs in exchange for a lot fronting seventy feet on the west side of Main street, and one hundred and forty-eight feet deep, just north of Thirtieth Street, the same being in the city of Los Angeles.

On January 4, 1902, the plaintiffs tendered to defendant a good and sufficient deed of grant, bargain, and sale describing the lot so orally agreed to be conveyed, and at the same time demanded of the defendant a proper conveyance of the property described in said writing, but defendant refused to accept the deed so tendered him or to convey the property described in the writing to the plaintiffs or to either of them.

If the option, or offer to convey, by defendant had been for a price named, although unilateral and signed by defendant only, it would have been binding upon him, if subsequently and prior to its withdrawal by defendant, plaintiffs acted upon it and tendered the price to be paid. In such case the contract or offer, although not mutual when first signed by defendant, would have become so by the price being paid or tendered. Here, however, the consideration to be paid by plaintiffs was not money, but an exchange of lands. There was no agreement or memorandum of any kind signed by plaintiffs as to the land to be by them conveyed to the defendant. It is therefore evident that at no time prior to the making and tender of the deed by plaintiffs could either party have enforced specific performance of the contract. It may be conceded for the purposes of this case, without deciding, that where the consideration for a unilateral agreement in writing to convey land is the oral agreement to convey land in exchange, the same rule would apply after a tender of a

deed to the land so orally agreed to be conveyed, as in cases where the consideration is money. If we give the plaintiffs the full benefit of the rule, yet they cannot recover in this case. The option was by its terms irrevocable for fifteen days and good thereafter until withdrawn. The fifteen days expired on the fourth day of December, 1901. No deed was tendered during this time nor till January 4, 1902. The court found that defendant had prior to that time withdrawn his offer. The findings on this point are as follows:—

“That the defendant about the middle of December, 1901, informed the plaintiffs that he would not carry out the deal and withdrew and revoked said option of November 19; such withdrawal and revocation being after the expiration of fifteen days from said November 19, and prior to the tender made by plaintiffs on January 4, 1902.

“That early in December, 1901, the defendant gave notice to said John A. White that he refused to carry out the deal and withdrew the option, and said White notified the plaintiff Hay of defendant's refusal.”

Plaintiffs contend that the above findings are not supported by the evidence, but we do not think the contention can be maintained.

Defendant testified: “I had a conversation about this deal in the first part or the middle of December. It was in front of their offices. Mr. Hay and Mr. White were present, and Van Vranken came in afterward. I told them I didn't think the deal would go. I called it all off. . . . I made an examination of the Main-Street property with Mr. Cal Hunter. It was a week or two after the option was signed we examined the property. It was after that that I notified Hay and Van Vranken that I wouldn't sign the deed.”

The witness White testified: “He [defendant] told me he didn't want to make the deal, on the basis he signed up on it. Didn't want to assume the mortgage. . . . I remember he told me that he called it off; . . . and after John [defendant] told me that he called off the deal, I communicated that fact to Hay and Van Vranken, and told them his reason for it was on account of the mortgage.”

The witness Hunter testified: “I went into Mr. Hay's office

one day after Mason had declared the deal off, and he told me I had knocked him out of making a trade. That was about the 7th or 8th of December, I think."

The above testimony is sufficient to support the findings.

It is claimed that plaintiffs, being only agents for one Mullin in the exchange of the lands, and not being owners of the lands which were described in the deed afterward tendered to defendant, cannot maintain the action for the purpose of getting their commission. It is unnecessary to decide this question. As the judgment must be affirmed, it becomes immaterial.

We advise that the judgment and order be affirmed.

Gray, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Shaw, J., Angellotti, J., Van Dyke, J.

[L. A. No. 1406. Department One.—January 21, 1904.]

W. E. AGARD, Respondent, v. EUGENE E. SHAFFER,
Auditor of San Diego County, Appellant.

PUBLIC OFFICERS—EXTRA CLERK FOR RECORDER—COMPENSATION—PROVISION BY SUPERVISORS—CONSTITUTIONAL LAW.—Section 3678 of the Political Code, directing the board of supervisors, when necessary, to provide for the payment of such additional clerical force as may be required to enable the county recorder to assist the assessor in the performance of his duties, by annually transmitting to him a complete abstract of all mortgages, deeds of trust, contracts, and other obligations by which any debt is secured, remaining unsatisfied upon the records, is in conflict with section 5 of article XI of the constitution, in leaving the regulation of the compensation of a county officer, in some measure, to the board of supervisors.

APPEAL from a judgment of the Superior Court of San Diego County. N. H. Conklin, Judge.

The facts are stated in the opinion.

Cassius Carter, District Attorney, and W. R. Andrews, Deputy District Attorney, for Appellant.

Stearns & Sweet, for Respondent.

GRAY, C.—The respondent, Agard, in a clerical capacity, assisted the recorder of San Diego County in the preparation of abstracts of mortgages to be furnished to the assessor of the same county, pursuant to the provisions of section 3678 of the Political Code. The board of supervisors of said county thereafter determined that the employment of respondent by the recorder was necessary to do such work, and allowed his claim therefor, amounting to \$1,304. The county auditor refused to draw his warrant for the claim, and Agard brought this proceeding in the superior court, and obtained judgment, requiring the auditor to draw his warrant on the county treasurer for the amount of the claim. The auditor appeals.

One contention of appellant is, that said section 3678 of the Political Code is in conflict with section 5 of article XI of the constitution, in that it leaves, in some measure at least, the regulation of the compensation of a county officer to the board of supervisors. We think this contention must be upheld.

The section of the code referred to reads as follows: "To assist the assessor in the performance of his duties, the recorder must annually transmit to the assessor, on or before the first Monday in April of each year, a complete abstract of all mortgages, deeds of trust, contracts, and other obligations by which any debt is secured, remaining unsatisfied on the records of his office," etc. "When necessary, the board of supervisors of each county must provide for the payment of such additional clerical force as may be required to enable the county recorder to comply with this section."

The said section 5 of article XI of the constitution provides as follows: "The legislature, by general and uniform laws, shall provide for the election or appointment in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office. It shall regulate the compensation of all such officers in proportion

to duties, and for this purpose may classify the counties by population," etc.

If the quoted section of the code is followed, it may well be that in some counties the board of supervisors will be of opinion that clerical assistance of the recorder to perform the official duties prescribed by the section is entirely unnecessary, and as a consequence such recorder will be compelled to pay his clerical help out of his own salary. In other counties an abundance of clerical assistance may be furnished the recorder and compensated directly from the county treasury. Thus it may be seen that the compensation of the recorder may be increased or diminished by the action of the several boards of supervisors under the statute. It was the purpose of the constitutional provision quoted that the legislature should regulate the compensation of all such officers in proportion to duties, and it was not intended that such compensation should be left either directly or indirectly to the discretion or regulation of the board of supervisors. This is clearly pointed out in *Dougherty v. Austin*, 94 Cal. 601, and *Welsh v. Bramlet*, 98 Cal. 222, and the reasons fully given. The same principle was referred to in *Tulare County v. May*, 118 Cal., at page 306, and the previous decisions upon this point in *Dougherty v. Austin*, and *Welsh v. Bramlet*, declared to be correct.

In the cases cited the compensation of deputies to be allowed or disallowed by the board of supervisors was the point wherein the statutes were held to be in violation of section 5 of article XI of the constitution. In the statute before us in this case the compensation was to be allowed by the board to "additional clerical force" to assist the recorder in performing his official duties. In principle there is no difference between helping out the recorder's compensation by furnishing him a *deputy* to perform the work of the office and furnishing him a "clerical force" to do the same thing. The one affects his compensation in exactly the same manner as the other. And if the power to do the one thing should not be delegated to the board of supervisors, then the power to do the other thing should not be so delegated.

Respondent cites the case of *Kirkwood v. Soto*, 87 Cal. 397, as being the same in principle as the case at bar. It will be seen on an examination of that case that section 5 of article

XI of the constitution is not discussed or even referred to. The court in that case, however, does distinguish between the "incidental expenses of the office" and "compensation for services to be rendered," and that distinction might well render the provision of the statute there under discussion not obnoxious to the provisions of section 5 of article XI of the constitution. The case is therefore inapplicable to the question here decided.

We advise that the judgment be reversed.

Haynes, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed. Shaw, J., Angellotti, J., Van Dyke, J.

[S. F. No. 2612. In Bank.—January 21, 1904.]

WORTHINGTON AMES, Respondent, v. SOUTHERN PACIFIC COMPANY, Appellant.

RAILROAD TICKET—SPECIAL TRAIN—RULE REQUIRING BERTH—NOTICE TO PURCHASER—ACTION FOR DAMAGES—PAROL EVIDENCE.—A railroad company has the right to run a special train at night for those only who procure sleeping-berths thereon; and a ticket for such train is subject to a rule making it a condition of the purchase that a berth shall be procured, of which the purchaser had notice, though not expressed in the ticket. In an action for damages for being put off of such train, all of the berths on which had been sold, parol evidence is admissible to prove such rule, and notice to the plaintiff by the ticket-agent that the ticket would not be good for such train, unless he procured a berth thereon. [Shaw, J., and Beatty, C. J., dissenting.]

1D.—TICKET NOT A FULL CONTRACT—RECEIPT FOR FARE—SUBJECTION TO RULES.—A railroad ticket is not a contract expressing all of the conditions and limitations usually contained in a written agreement; but it is more in the nature of a receipt, evidencing that the passenger has paid his fare for a certain kind of passage on the proper trains of the company, as limited and regulated by its lawful rules, to which the passenger may be required to conform, though not expressed in the ticket. [Shaw, J., and Beatty, C. J., dissenting.]

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

P. F. Dunne, for Appellant.

George B. Merrill, for Respondent.

VAN DYKE, J.—This is an appeal from an order granting the plaintiff's motion for a new trial. The action is for damages on account of being put off from one of defendant's trains.

The evidence shows that the plaintiff went to defendant's ticket office at the foot of Market Street in San Francisco, a little before five o'clock, in November, 1899, being a very short time before the boat left that crosses the bay in connection with the train for Los Angeles. He asked the defendant's ticket-seller for a ticket for the "Owl" train, and was immediately asked if he had a berth in the sleeper. Plaintiff informed the defendant's agent who sold the tickets that he had not, and was then told he would have to get a sleeping berth across the bay or his ticket would not be good on the "Owl." He, however, requested the ticket and paid for and purchased one which, as far as material here, reads as follows: "Special limited; good for one continuous first-class passage, San Francisco to Los Angeles, 9:26m. Good only by Martinez route by train No. ——" On the ticket in the blank space after No. was stamped the words, "The Owl." This ticket was sold at the same price as a regular first-class ticket. On crossing the bay to connect with the "Owl" train plaintiff went to the Pullman conductor and asked for a berth. He was told that the berths had all been sold, and that his ticket would not be good on that train, as no berths could be procured. He was again told the same thing on the steps of the train before he got aboard. Notwithstanding this, however, he boarded the train and took a seat in the day coach, which was not a sleeper, and ran only as far as Bakersfield. Defendant at the time was running two regular daily trains from San Francisco to Los Angeles, one leaving in the morn-

ing at nine o'clock, the other leaving in the evening at half-past five, and, in addition thereto, to accommodate persons desiring to make the trip quickly, it was running a special limited train called the "Owl," which ran at night only, at a special rate, upon a special schedule, with a limited number of Pullman sleepers, containing no accommodations for passengers except those who had berths. This was known to the plaintiff, as, in addition to being informed of the same, he had previously traveled on that train three or four times, between San Francisco and Los Angeles. Upon presenting his ticket to the conductor he was told his ticket was not good on the train unless he had a sleeping-berth, and that he would have to get off at Port Costa, and could there take the next regular Los Angeles train, which would be along in forty minutes, and would reach Los Angeles at one o'clock on the following day, instead of eight o'clock in the morning, that being the schedule time for the "Owl." This the plaintiff refused to do, and said he would return to San Francisco and bring suit against the company for damages, which he did.

The case was tried before a jury, resulting in a verdict for the defendant. The court in granting plaintiff's motion for a new trial said: "The same is granted upon the ground that the evidence does not support the verdict in this: That the notification to the plaintiff by the ticket-seller, when he purchased the railroad ticket in question, that such ticket would not be good upon the 'Owl' train unless he secured a berth, cannot and did not control or affect the obligation of the company, as evidenced by the ticket."

The question to be considered on this appeal, therefore, is whether the court below, in granting the new trial, correctly stated the law governing the case. The theory on which the order seems to have been made is, that the ticket is a contract, expressing all of its terms, and that the purchaser is not bound by any rules or regulations of the carrier other than those expressed on the ticket. We do not think such a contention can be maintained. Defendant had a right to run a special limited train for those only who could secure sleeping accommodations, and to make it a condition as to the purchase of the ticket that the passenger should procure a sleeping-berth before it could give him the benefit of the special train. The ticket stated on its face that it was a special lim-

ited ticket, good for one continuous first-class passage, "San Francisco to Los Angeles." The evidence shows that the ticket was good for any other train on the date stamped upon it. The words cannot be held to be a contract that the purchaser could ride upon the "Owl," except upon compliance with the regulations of the defendant as to securing a berth. According to the letter of the ticket the plaintiff was entitled to take the "Owl" train at San Francisco instead of at Oakland. Yet he knew when he purchased it that he could not take that train at San Francisco, but must cross by ferry-boat from San Francisco to the Oakland side of the bay and take it there, and that was therefore the contract or agreement, notwithstanding the reading of the ticket to the contrary. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, sec. 1636.) "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." (Civ. Code, sec. 1647.) "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." (Civ. Code, sec. 1648.) "Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected." (Civ. Code, sec. 1653.)

But a railroad ticket is not a contract expressing all the conditions and limitations usually contained in a written agreement. It is more in the nature of a receipt given by the railroad company as evidence that the passenger has paid his fare for a certain kind of passage on the proper trains of the company, as limited and regulated by its rules. The fact that the word "The Owl" were stamped on the ticket entitled the plaintiff to ride upon that train if he had complied with the conditions of securing a berth thereon, which he failed to do. It is said in Elliott on Railroads (sec. 1593): "According to the generally accepted doctrine, a ticket, in the ordinary form, is a voucher, token, or receipt, rather than a contract, adopted for convenience, to show that the passenger has paid his fare from the place or station named therein as

the place of departure to the place or station named therein as the place of destination. . . . A ticket is evidence of a contract to carry and the right to passage, but the contract itself is implied by law, except in so far as it is expressed in the ticket. Upon the theory that it is not itself the written contract, parol evidence has been held admissible to prove the terms of the contract in fact entered into between the company and the passenger, or the representations made by the agent, at the time the ticket was purchased, as to stop-over privileges or the like." In conformity with the foregoing, our code provides: "A common carrier of persons may make rules for the conduct of his business, and may require passengers to conform to them, if they are lawful, public, uniform in their application, and reasonable." (Civ. Code, sec. 2186.) "A passenger who refuses to pay his fare or to conform to any lawful regulation of the carrier, may be ejected from the vehicle by the carrier. But this must be done with as little violence as possible, and at any usual stopping-place or near some dwelling-house." (Civ. Code, sec. 2188.) In *Dietrick v. Pennsylvania etc. R. R. Co.*, 71 Pa. St. 436,¹ in speaking of railroad tickets, it is said: "So far as they are expressed the terms are binding of course, but such tickets are not the whole contract, which must be gathered so far as not expressed, from the rules and regulations of the company in running its trains. . . . The authorities, as well as the reason of the thing, show that the company must make its own regulations, and that passengers purchase their tickets subject to these rules, and that it does not lie on the company to bring home notice of them in order to establish the terms of the contract of carriage." This case was approved in a later one, *Lakeshore etc. Ry. Co. v. Rosenzweig*, 113 Pa. St. 536, in which it was said: "The plaintiff's ticket was evidence of the payment of his fare, and of his right to be carried according to its terms. It did not express the whole contract. What it does not set forth may be ascertained from the reasonable rules and regulations of the defendant; and the holder of the ticket is bound to inform himself of such regulations respecting the conduct of trains and the right of passengers." In *Chicago etc. R. R. Co. v. Randolph*, 53 Ill. 515,² the court said:

¹ 10 Am. Rep. 711.

² 5 Am. Rep. 60.

"When a traveler obtains such a ticket, he should inform himself as to the usual mode of travel on the road, and so far as the customary mode of carrying passengers is reasonable, he should conform to it. . . . The requisite information can always be had from the agent where the ticket is procured, and it is but reasonable to require passengers to obtain the information and act upon it." (See, also, *Peck v. New York Cent. R. R. Co.*, 70 N. Y. 587; *McRae v. Wilmington etc. R. R. Co.*, 88 N. C. 532;¹ *Wright v. California Cent. Ry. Co.*, 78 Cal. 360.) As stated in the foregoing, a ticket seldom expresses all the conditions of the contract between the carrier and the passenger. The liability of the carrier, the conditions implied by law, and the conditions upon which the passenger may use the ticket are seldom expressed therein. In such case parol evidence is admissible to show the elements of the contract, if not in conflict with its express terms. (1 *Fetter on Carriage of Passengers*, sec. 275; *Burnham v. Grand Trunk Ry. Co.*, 63 Me. 301;² *Peterson v. Chicago etc. Ry. Co.*, 80 Iowa, 98.) The rule as herein laid down worked no injustice to the plaintiff. He was distinctly told when he purchased the ticket, and subsequent thereto, that he could not use it on the "Owl" without a berth in the sleeper, and his ticket was good on a regular train following it in less than half an hour at the point where he left the "Owl," which would have carried him to the same destination a few hours later than the schedule time of the "Owl." While it is the duty of railroad companies carrying passengers to use all reasonable protection for their safety, comfort, and convenience, it is also the duty of passengers to comply with reasonable rules and regulations of the company.

The court below erred in holding that the notification to the plaintiff that his ticket in question would not be good upon the "Owl" train unless he secured a sleeping-berth could not control or affect the obligation of the company as evidenced by the ticket. As this appears to be the only ground upon which the motion for a new trial was granted, the order granting the same is reversed.

McFarland, J., Lorigan, J., and Henshaw, J., concurred.

¹ 43 Am. Rep. 745.

² 18 Am. Rep. 220.

SHAW, J., dissenting.—I dissent. I take it that no proposition is more fully settled than this, that parol evidence cannot be admitted or used to vary or contradict the effect of a written contract. In this state this rule has the express force of statute law. "The execution of a contract in writing, whether the law requires it to be written or not, supercedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." (Civ. Code, sec. 1625.) "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible." (Civ. Code, sec. 1639.) "The language of a contract is to govern its interpretation, if the language is clear and explicit." (Civ. Code, sec. 1638.) And the previous decisions of this court are in full accord with these principles. "The law deems all such stipulations merged in the writing, which is treated as the exclusive medium of ascertaining the agreement to which the parties bound themselves." (*Goldman v. Davis*, 23 Cal. 256; *Guy v. Bibend*, 41 Cal. 322; *Ward v. McNaughton*, 43 Cal. 159; *Nicholson v. Tarpey*, 89 Cal. 617.) Parol evidence is inadmissible to prove that an unconditional written obligation is not to be performed except upon a contingency not stated in the writing. (*San Jose Sav. Bank v. Stone*, 59 Cal. 187; *Long v. Saufley*, 89 Cal. 439; *Bradford Ins. Co. v. Joost*, 117 Cal. 210; *Cashman v. Harrison*, 90 Cal. 297; *Dexter v. Ohlander*, 89 Ala. 262.) The majority opinion holds that this case is an exception to the rule.

The reason first given is, that the ticket in question, notwithstanding its terms, is subject to the rules and regulations of the defendant company contrary thereto. I concede that proof of such regulations or of other explanatory facts, coupled with proof of knowledge thereof by the parties, is competent to help out a contract where it is uncertain, or to supply anything omitted therefrom. It would have been proper, for illustration, to show in the case at hand what was meant by the "Martinez route," and by the "Owl train." For this would explain what would otherwise be an ambiguity in the terms of the contract. But here the effect of the regulation is to contradict the contract, to destroy altogether the undertaking of the defendant therein set forth, except upon a condition not therein expressed, and to require the payment

of an additional consideration for an additional accommodation as a condition precedent to the existence of any obligation on the part of the carrier. The proposition that such regulations control, instead of the contract, is certainly a startling one. There is a well-known principle to the effect that a contract must be interpreted according to the law or usage of the place where it is to be performed. (Civ. Code, sec. 1646.) It has been said that such laws are a part of the contract. (9 Cyc. of Law and Proc., sec. 582.) But even this doctrine is confined to such terms as are omitted from the contract, and which the law supplies. Where the contract is contrary to the law, it does not have the effect of adding a term to the contract, and thus making an agreement to which the parties have not consented, but of making the contract to that extent invalid. I think it has never before been decided that the rules and regulations of a railroad company are of greater potency than the law of the land, and when inconsistent with and contrary to a written contract, into which the company has entered, are paramount thereto, and furnish the legal measure of the rights of the parties, instead of the contract itself. Not even a general usage or custom of trade, much less a mere business regulation of one of the parties, can be proven to relieve a party from his express stipulation, or to vary a written contract which is certain in its terms. (Code Civ. Proc., sec. 1870, subd. 12; *Holloway v. McNear*, 81 Cal. 156; *Burns v. Sennett*, 99 Cal. 371; *Milwaukee Co. v. Palatine*, 128 Cal. 74; *Ah Tony v. Earl Fruit Co.*, 112 Cal. 681.)

The other reason given for the prevailing opinion is, that "a railroad ticket is not a contract expressing all the conditions and limitations usually contained in a written agreement," but "is more in the nature of a receipt given by the railroad company as evidence that the passenger has paid his fare for a certain kind of passage on the proper trains of the company, as limited and regulated by its rules." Of course, railroad tickets do not always express the whole contract. In fact, they seldom do. But this is beside the question. We are not here concerned with some term of the actual agreement that was omitted from the writing, but with a term which was inserted, and which defendant seeks to nullify by proof of a parol contract of a different effect.

With singular inconsistency, the majority opinion quotes in its support a passage from *Dietrich v. Pennsylvania etc. R. R. Co.*, 71 Pa. St. 436,¹ the very first words whereof are, "So far as they are expressed the terms are binding, of course." I concede that where a railroad ticket is unsigned, and is a mere memorandum expressing, in part, an agreement for the carriage of the passenger, it is proper to supplement it, or even contradict it, by proof of additional parol conditions and stipulations inconsistent with the printed memorandum. Many of the decided cases are thus explainable. But it cannot be successfully contended that the ticket here in question was not a contract, intended to be binding on the parties, so far as it expressed the terms thereof. This is best shown by the contract itself. It was regularly signed by the plaintiff and indorsed by the defendant, and was as follows:—

"Special limited ticket good for one continuous first-class passage, San Francisco to Los Angeles. 9:26 m. Good only by Martinez route, by train No. . . 'The Owl' subject to the following contract: In consideration of this ticket being sold at a rate less than the regular first-class rate, I, the purchaser, hereby agree that it shall not be good for passage after the date indicated by the agent's punch marks in the margin (Nov. 12, 1899), and that it will be good only for a continuous trip to destination by the proper train and its connecting trains. That it is not transferable and shall be void after the date of expiration. And that failing to accept and comply with this agreement, the conductor will refuse to accept this ticket, and demand the full regulation fare, which I agree to pay. No stop-over privileges will be given on this ticket. Baggage must not be checked hereon to or from intermediate or way stations. Liability for damage limited to \$100. Agent will in no case extend time on this ticket. If more than one date be punched, it shall not be received for passage by conductor."

(Signed) "W. AMES."

(Indorsed by stamp) "Southern Pacific Company,

"November 11, 1899."

The defendant must certainly have intended to exact from the plaintiff the execution of this ticket as a contract, and one that would be binding on him for all the conditions expressed therein. The cases involving tickets not signed, or

¹ 110 Am. Rep. 711.

terms not covered by the contract therein expressed, have no application here. It is from such cases alone that the prevailing opinion finds support. If the evidence offered had been of some agreement not contradictory of the agreement expressed in the ticket, it would of course have been admissible, but this cannot be contended. The ticket in question was a clear undertaking on the part of the defendant to carry the plaintiff upon a continuous trip with first-class accommodations on the Owl train from San Francisco to Los Angeles by the Martinez route. No conditions were expressed requiring the purchase of any berth upon the sleeping-car. By the parol evidence introduced the defendant endeavored to prove that, notwithstanding this agreement, there was a contract that the defendant should be under no obligation to carry the plaintiff upon that particular train, unless, in addition to the price of the ticket which he paid, he should succeed in purchasing from another company a berth in a sleeping-car at an additional price. This was making a contract inconsistent with the written contract, and is contrary to all the principles laid down in our codes, and contrary to the rules expressed in the authorities cited in the prevailing opinion itself. I can see no reason why a railroad company is not as much bound by such a contract for the carriage of a passenger as it is by the terms and conditions of an ordinary bill of lading for the carriage of freight. The signature to a ticket is required because the railroad company intends that the passenger shall be bound. It is an unvarying rule that contracts are mutual, and if one party is bound by its terms both must be.

There is no element of hardship in the case which requires any relaxation of the rule. The defendant was entitled to the benefit of the evidence which it introduced, not for the purpose of varying or changing the contract in the least, but for an entirely different purpose. The question of damages was a material one in the case, and it was proper for the defendant to prove that the plaintiff had been informed before he entered upon his journey that he would not be allowed to ride upon that train unless he obtained a sleeping-car berth. If he was thus warned of the consequences he could not claim so much damages as he might well do if he had been taken by surprise and ejected from the train with-

out previous notice. The testimony was therefore admissible in mitigation of damages, and would be of much weight for that purpose, but it should not be used to vary the contract expressed in the ticket.

Beatty, C. J., concurred with Shaw, J.

Rehearing denied.

[Sac. No. 1094. Department One.—January 22, 1904.]

ELLA H. ARNOLD, Executrix, etc., Respondent, v. PRODUCERS' FRUIT COMPANY, Appellant.

NEW TRIAL—SETTLEMENT OF STATEMENT—IRRELEVANT MATTER—DUTY OF JUDGE AND OF COUNSEL.—It is the duty of the judge in settling a statement on motion for a new trial to strike out of it all irrelevant and redundant matter, notwithstanding the consent of the parties thereto; and the judge should perform his duty fearlessly and should not, to settle disputes between counsel, order the whole of the reporter's notes inserted, containing a great mass of irrelevant matter. It is the duty of counsel to aid and assist the court so as to have the record present only the material matter necessary to the consideration of the questions raised.

ID.—ACTION FOR BREACH OF CONTRACT—NEGLIGENCE IN HANDLING PRUNE CROP—VERDICT FOR DAMAGES—SUFFICIENCY OF EVIDENCE.—Where there is ample evidence in the record to show a negligent breach of a contract by the defendant to dry, cure, and pack plaintiff's prune crop, to the damage of the plaintiff in the amount awarded for such negligence by the jury, who heard all the testimony and found the truth of the testimony as to such negligence, which was also passed upon by the judge in denying defendants' motion for a new trial, the verdict for the plaintiff will not be disturbed upon appeal for insufficiency of the evidence.

ID.—TRIAL—QUALIFICATION OF JUROR—CROPPING LEASE—DELIVERY OF CROP.—The fact that a juror was a tenant of the plaintiff under a lease which required him to deliver as rent a certain share of the crop after harvest, which had been delivered for the current year, did not make the juror either the partner or the agent of the plaintiff, and did not disqualify him as a juror under section 602 of the

Code of Civil Procedure; and a challenge to such juror for cause was properly denied.

1D.—CONTRACT FOR SALE OF PRUNES BY DEFENDANT—EVIDENCE—OPPORTUNITY OF PLAINTIFF.—Where by the terms of the contract the defendant had the right to sell the prunes, and the plaintiff was not allowed to sell any portion of it except through the defendant, and by paying its commission, evidence was not admissible to show that prior to the damage caused by defendant to the prunes, the plaintiff had an opportunity to sell them for the market price.

1D.—COMPARISON OF PRUNES—IRRELEVANT EVIDENCE.—Evidence that plaintiff exhibited samples of prunes taken from another county, for the purpose of making a comparison with plaintiff's prunes, was irrelevant.

1D.—SALES OF OTHER PRUNES.—Evidence as to the price received by the defendant for the sales of other prunes than those of plaintiff, at a time two months earlier than the sale of plaintiff's prunes, was not competent to prove any issue in the case.

1D.—INSTRUCTIONS—MEASURE OF DAMAGES—REDIPPING OF PRUNES.—There was no error in instructing the jury that if they "find that the defendant did not use ordinary diligence, skill, or care in drying curing, packing, and handling said fruit, the damage to plaintiff is the difference between the market value of such fruit at the time of sale, had ordinary diligence, skill and care been used by defendant in drying, curing, packing, and handling the same, and the sum for which the same was sold," where no evidence appears in the record to show a different measure of damages, on account of a redipping of the prunes, the date of which does not appear, and which may have been just completed at the time of sale.

1D.—REFUSAL OF REQUESTED INSTRUCTIONS—INSUFFICIENT ARGUMENT.—A statement in the brief of appellant that "The instructions of defendant which the court refused to give were proper and necessary to guide the jury in its verdict," and that "The instructions Nos. 13, 14, 15, and 16 should have been given," is insufficient, is not pointing out the error in refusing each particular instruction, and the reasons why it should have been given. This court will not examine the offered instructions, and go through the record to see whether or not any of them was necessary to guide the jury in its verdict.

APPEAL from an order of the Superior Court of Colusa County denying a new trial. H. M. Alberty, Judge.

The facts are stated in the opinion in this case, and in the opinion rendered upon the former appeal, 128 Cal. 637.

William M. Sims, and B. F. Howard, for Appellant.

E. T. Crane, and U. W. Brown, for Respondent.

COOPER, C.—This action was brought to recover \$1,355.49 damages, alleged to have been caused by the negligence of defendant in drying, curing, and packing plaintiff's prune crop of the year 1897, and a balance of \$573.60, claimed to be due from sales of prunes made by defendant for plaintiff. The case has been here on a former appeal (*Arnold v. Producers' Fruit Co.*, 128 Cal. 637), and the contract made by the parties is therein fully set forth and also a statement of the facts, which need not be here repeated. On the former appeal the order denying a new trial was reversed and the cause remanded because of errors in the admission of evidence.

The new trial in the court below before a jury resulted in a verdict for the plaintiff in the sum of \$906.11, upon which judgment was entered.

Defendant made a motion for a new trial, which was denied, and this appeal is from the order denying the motion, and comes here on a statement of the case. Counsel for appellant call attention to the fact that the statement consists of over three hundred printed pages, most of it redundant and useless matter. We have carefully examined it and have no hesitation in condemning it as an undigested mass, not calculated to aid or assist this court in its arduous labors. Almost the whole of the reporter's notes appear in the statement. Pages upon pages are occupied with questions and answers in regard to rulings and evidence in no way challenged. In fact, it seems that the judge of the court below, in order to settle the disputes of counsel, ordered the whole matter to be incorporated in the statement. It is made the duty of the judge in settling a statement to strike out of it all redundant and useless matter, notwithstanding the consent of the parties to such matter or to any inaccurate statement. (Code Civ. Proc., sec. 659.) In cases where counsel are contentious, act in a spirit of bad faith, or attempt to insert all immaterial matter, the task of the trial judge is not an easy one. But he should meet it and perform his duty fearlessly. On the other hand, it is the duty of counsel to protect the high standard of their profession, and to aid and assist the court, with the sole object and purpose of having

the record present only the material matter necessary to the consideration of the questions raised. To the credit of the profession and of the trial judges, this course is usually followed. It was not followed in this case, but we are not prepared from the record to say with whom the fault lies. Counsel for appellant insist that the matter was inserted by reason of the deliberate purpose of counsel for respondent to make a large and expensive record, while counsel for respondent call attention to the fact that appellant's counsel have specified seventy-nine erroneous rulings, and allege that the statement served upon them was inaccurate in nearly all respects, and was not made from the reporter's notes. Without deciding the accusations of counsel against each other, we consider it sufficient to say that we trust this course will not be followed hereafter.

We will proceed to discuss the errors deemed by counsel most important and upon which they rely.

1. It is claimed that the evidence is insufficient to justify the verdict. Counsel for appellant say in their brief: "It will be seen that the testimony of the parties apparently conflicts, but a careful reading of the entire testimony will show that notwithstanding that there is some evidence on minor points to support plaintiff's case, yet certain testimony given by his own witnesses and especially by himself nullified the weak statements of his witnesses as to any careless or improper handling of the prunes by defendant."

We have carefully read the testimony, and it is sufficient to say that there is ample evidence in the record to justify the jury in finding negligence of the defendant in handling and drying the prunes. There is evidence that some of the prunes were so damaged that they were thrown away; that portions of them were fermented and moldy, and were treated with acids in such manner as to injure them and make them unsalable; that the trays were improperly piled one upon the other; that the prunes were placed in the bins wet and uncured, and that they were not shoveled or changed often enough to prevent them from becoming damaged. The jury saw the witnesses and heard the testimony as it fell from their lips, and by its verdict found the truth of the evidence as to negligence. The judge of the court below again passed

upon the testimony in denying the motion for a new trial. We cannot, under the rule, set aside the verdict for insufficiency of the evidence upon the record presented here.

2. It is claimed that the court erred in denying the challenge of the defendant to the juror Mullaly for cause. It appeared that the juror was a tenant of plaintiff under a lease which required him to deliver as rent a certain share of the crop after harvest, and that the crop for the year had been delivered. This did not make the juror either the partner or agent of the plaintiff (*Clark v. Cobb*, 121 Cal. 595), and hence he was not disqualified under section 602 of the Code of Civil Procedure. The challenge was properly denied.

3. The plaintiff testified in his own behalf. It appeared from his testimony in cross-examination that he visited San Jose early in October, 1897; that he took with him some samples of his prunes which had been dried by defendant. He was then asked by defendant the following question: "Q. Isn't it a fact, Mr. Arnold, that at that time and on that visit you could have sold your prunes for at least two and one half or three cents?"

Plaintiff's counsel objected to the question on the grounds that it was not proper cross-examination, incompetent, and immaterial. The court sustained the objection, and the ruling is claimed to be error. It was evidently the purpose of defendant to show that plaintiff had an opportunity to sell his prunes for the market price and failed to do so, and hence was not damaged. The evidence was not admissible for such purpose. The contract did not allow the plaintiff to sell any portion of the prunes except through the defendant and by paying its commission. By the contract defendant had the right to sell the prunes. It did sell them in February, 1898. Plaintiff was under no obligation to sell them, and if the prunes were damaged by the negligence of defendant it is no excuse for it to show that defendant at some time prior to the time of the actual sale could have sold them for the market price.

The question was as to the negligence of defendant, and the damage, if any, finally sustained by the plaintiff. It does not appear that the prunes were cured in October, 1897, when plaintiff went to San Jose, and it does appear that

the damage was caused after the time referred to in the question. But, under any view of the case, we cannot think it was any defense for the defendant to show that in October, 1897, plaintiff could have sold his prunes for more than defendant was afterward able to sell them for. Plaintiff had the right to wait for a better market, and to assume that defendant would perform its part of the contract.

4. Complaint is made of several rulings of the court sustaining questions asked of plaintiff in cross-examination for the purpose of showing that he exhibited samples of prunes taken from Santa Clara County for the purpose of making a comparison with his own. The evidence was wholly irrelevant, as the question was not as to the character of the Santa Clara prunes, but the negligence of the defendant in not doing what it agreed to do in a proper manner. The quality of the Santa Clara prunes was not shown, and such comparison would have been worthless. But the defendant afterward succeeded in getting the witness to testify that he compared the sample of his prunes with the Santa Clara prunes, and that his sample "beat anything he had seen in Santa Clara County."

5. Plaintiff's objections were sustained to questions asked by defendant of the witness Stahl as to whether or not he sold any carloads of the prunes in defendant's warehouse early in December, 1897, and if so, what price he received.

We do not think the evidence was competent to prove any issue in the case; and not only this, but the witness testified that the sales concerning which he was being questioned did not include any of plaintiff's prunes. Counsel for plaintiff stated in open court that they would not make any objection to questions as to the sale of any of plaintiff's prunes.

We have examined the other alleged errors in the rulings upon the admission of evidence discussed by counsel in their brief, and find no error that would justify a reversal of the case.

6. The court instructed the jury: "In the event the jury find that the defendant did not use ordinary diligence, skill, or care in drying, curing, packing, and handling said fruit, the damage to plaintiff is the difference between the market value of such fruit at the time of the sale, had ordinary dili-

gence, skill, and care been used by defendant in drying, curing, packing, and handling the same, and the sum for which the same was sold."

Defendant argues that the evidence shows that the prunes were redipped by it about January 10, 1898, and that the measure of plaintiff's damage was the "difference between the market value of good, merchantable prunes, and the value of plaintiff's prunes at the time they had been redipped and not at the time of sale."

We fail to find any evidence, and none has been pointed out to us, as to the date or dates when the prunes were redipped. The redipping may have just been completed at the time of the sale. Counsel for defendant say in their brief: "The instructions of defendant which the court refused to give were proper and necessary to guide the jury in its verdict," and again, "The instructions Nos. 13, 14, 15, and 16 should have been given." If any instruction was necessary and proper to guide the jury, it is the duty of counsel to point it out and state the proposition of law requested as such guide to the jury. And if any instruction was refused, counsel should call attention to the error caused by its refusal and the reasons why it should have been given.

We will not examine the offered instructions and go through the record to see whether or not any one of them was necessary to guide the jury in its verdict.

We advise that the order be affirmed

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion, the order appealed from is affirmed.

Shaw, J., Angellotti, J., Van Dyke, J.

Hearing in Bank denied.

In Memoriam

ELISHA WILLIAMS MCKINSTRY

[At the opening of the Court in Bank of the 8th of November, 1902, Hon. J. M. Seawell, on behalf of the Bar Association of San Francisco, presented the following memorial, adopted by the association on the death of Elisha William McKinstry, formerly an associate justice of the Supreme Court of California. The memorial was received by the Court, which ordered it spread upon the minutes and published in the reports.]

Judge MCKINSTREY was born in Detroit, Michigan, April 11, 1825. He was of Revolutionary and Puritan stock. Both his father and grandfather served as officers in the War of Independence; and through his mother he was descended from William Bradford, the second governor of Plymouth Colony, who came over in the Mayflower. Having received a liberal education as a student at Kenyon College, Ohio, and Columbia College, New York, he studied law, and in 1847 was admitted to the bar in the city of New York, where he was engaged in the practice of his profession for about two years. In 1849 he removed to California. The talents and character, which were afterward so conspicuously displayed in the public service, attracted the notice of his fellow-citizens immediately after his arrival here. He was elected a member from Sacramento of the first legislature which met after the adoption of the constitution of 1849. By the next succeeding legislature he was elected adjutant-general, but declined the office. In 1851 he removed to Napa City, and in the fall of 1852, while practicing law there, he was, at the age of twenty-seven years, elected district judge of the seventh judicial district for the term of six years, and was re-elected for another term in 1858. Resigning that office, November 13, 1862, he removed to the state of Nevada, where he practiced his profession for a few years, and during that time received a nomination for justice of the Supreme Court of that state. Having returned to California, he was, in October, 1867, elected county judge

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of San Francisco for a term of four years, before the expiration of which he was elected, as an independent candidate, judge of the twelfth district court. While serving in that office, he was, in 1873, elected a justice of the Supreme Court of this state. In 1879 he was re-elected to the supreme bench under the new constitution, and drew a long term of eleven years. He resigned his office October 1, 1888, to accept the professorship of municipal law in the Hastings Law College, which position he resigned in 1890. After that time, so long as his health permitted, he was engaged in the practice of law. He died on the first of November, 1901, near San Jose, where, fifty years before, he began his services to the state.

But your committee feel that something more is expected of them than this brief and meager epitome of the career of our distinguished and beloved brother. The greater part of his life in California was spent in the public service. He served upon the bench thirty-one years, during sixteen of which he was a justice of the Supreme Court. It is peculiarly appropriate that this association, of which for many years he was an honored member, should make some public recognition of his character and service.

Judge MCKINSTAY'S mind and character fitted him pre-eminently for the bench, and it is creditable to the discernment of the people among whom he lived that they were not slow to recognize his peculiar fitness for the judicial office. That fitness was too conspicuous to render necessary any struggle on his part to secure either a nomination or an election. He was not an office-seeker; and for his advancement he was indebted solely to the recognition by the public of his great abilities and high character.

The opinions of Judge MCKINSTAY, while a justice of the Supreme Court, are to be found in thirty volumes of the California Reports (47 to 76, inclusive); his last being a dissenting opinion in *People v. Henshaw*, 76 Cal. 447. Perhaps the opinions which best display his learning and ability as a jurist are those in *Ex parte Wall*, 48 Cal. 279; *People v. Lynch*, 51 Cal. 15; *Estate of Hinckley*, 58 Cal. 457; and *Lux v. Haggia*, 69 Cal. 264.

In the first, generally known as the "local option" case, he decided that the legislature has no power to refer a statute to the people to decide by a popular vote whether it shall go into effect. In *People v. Lynch*, he held that the legislature can-

not by special act deprive the city council or other appropriate local authority of a municipal corporation of all discretion in respect to a local improvement, where by the charter of the city the matter of such improvement is left to the judgment and discretion of such local authority; and that the power of assessment (as distinguished from taxation) cannot be directly exercised by the legislature within the limits of an incorporated city.

In none of Judge McKINSTRY's decisions are the qualities of his mind more strikingly displayed than in his opinion in *Estate of Hinckley*, where he held that trusts for perpetual charitable uses are not in conflict with section 16 of article XI of the constitution of 1849; that charities are not forbidden by the provisions of the Civil Code which prohibit perpetuities or by those which limit the purposes for which trusts of real property may be created; that courts of equity in this state have jurisdiction, independent of the Statute 43 Elizabeth, to establish and enforce charities when trustees competent to take the legal estate are named and the class to be benefited and the individuals to be designated by the trustees are capable of ascertainment. He also held that those courts have power *cy pres* to direct trustees, in a deed or will, to carry into effect the general lawful and charitable intent of the trustor, when the particular scheme has become impracticable.

But the most important of Judge McKINSTRY's decisions, and one by which his fame as a jurist will be transmitted to posterity, is his masterly opinion in the great case of *Lux v. Haggin*, in which it was held by a divided court that the common law as to riparian rights prevailed in California. Time will not permit any extended review of that opinion. It fills seventy-five pages of the report, and is an imperishable monument to the learning and ability of its author.

Judge McKINSTRY was a man of absolute mental and moral integrity. We mean not merely the ability to withstand all forms of pecuniary temptation, which is but the characteristic of common honesty, but also that wholeness and uprightness of nature which is proof against the insidious influence of wealth and social position as well as those of passion and prejudice, and seeks only justice by the intelligent and conscientious application of the laws. He scorned every form of falsehood or deceit. He was of rare moral courage, and fear-

less in the discharge of his duty, uninfluenced either by popular clamor or popular applause. He was of a chivalric nature and the highest sense of honor. He was the friend of religious liberty and toleration, and never faltered in maintaining and enforcing the limitations of the constitution by which the liberty and property of the citizens are secured from legislative encroachment.

The predominant quality, the most noticeable feature of the character of Judge McKINSTRY, was primitive honesty; not the honesty of adopted policy, nor even that growing from a high standard of ethics. It was not the honesty of environment, that bred by precept and example, but was the honesty of nature, which knew no cause for concealment, for sophistry or casuistry, and which sought no end by indirection, nor feared the results of open expression. In these days of worship of the self-made, it may be said that one so endowed is entitled to less admiration than is he who had attained equal virtues by determination and discipline. But, after all, what product of art can equal that of nature? The cast from Nature's mold is unchangeable; that formed by art may be reformed; we trust the permanency of the one, we look for change in the other. And thus it was that the social and professional associates of Judge McKINSTRY regarded him. He was not subject to change through fear or interest, and he met persuasion open-eyed. Not even his mental processes were concealed. We, of this bar, recall his manner of receiving and considering our arguments. He would recite our proposition, repeat our sequential steps until he reached one which gave no logical foothold, and then, with a troubled and disappointed "Ah!" would by look indicate to the advocate a suggestion of further assurance or explanation. But it was not intended as a rebuff; his own mind was engaged in inquiry, and it seems to be the necessary accompaniment of all honest, logical thought to reach conclusions slowly and hesitatingly. Even when the apparent end appears, the conscientious mind still has lingering doubt of its identity. That trait is noticeable in some of his written opinions to an extent that mars them to the impatient or superficial thinker.

In necessary harmony with that quality of openness was his entire freedom from pretense and affectation. He never showed ruffled dignity, and when off duty was familiar almost to playfulness with his associates. No class or caste was

known to him, for such a nature is essentially democratic in feeling and action, and differentiation of his fellows was never shown save when, impelled by a sense of humor, he made some quaint comment upon incident or personal characteristic. Of course, one so approachable, one so trusted, was especially dear to the younger members of the bar, and among that class no judge of his day had so large and admiring a following.

In the veins of Judge MCKINSTY were blended the blood of the Puritan and the Revolutionary patriot; and he proved himself worthy of his lineage. He cherished the traditions of the War of Independence and the early days of the republic. He was a true patriot. It was appropriate that he should have been chosen, as he was, president of the San Francisco branch of the Sons of the American Revolution. He was also a prominent member of the Mayflower Descendants, Colonial Government, and the Society of Colonial Wars. It may be added, in this connection, that he was also president of the Society of California Pioneers, and that he received from the University of Michigan the degree of doctor of laws.

In private life, Judge MCKINSTY was a charming and entertaining companion. There was no member of this association whose presence among us was more welcome. He had a philosophical mind, and his extensive reading both in prose and poetry had been guided by a fine literary taste. He had also a keen sense of humor, which did not desert him in his severest mental labors.

He was a sincere lover of truth, and acquired early the habit of testing every proposition by the processes of reasoning. Upon many of his most intimate friends at one period of his life he produced the impression of a tendency to skepticism. But whatever doubts he may have previously entertained in reference to the mysteries of revealed religion passed from his mind some years before his death, and he became a sincere and devout Christian and member of the Catholic Church.

In all his domestic relations as husband and father his life was beautiful, and he has left to his surviving family the priceless legacy of a pure and stainless name.

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4. PRELIMINARY QUESTION AS TO LETTER—PREJUDICIAL ERROR NOT SHOWN.—Where the defendant was merely asked a preliminary question as to whether he could state the contents of a letter writ-

AGENCY (Continued).

ten by him, of which he had no copy, which could be answered by "Yes" or "No," and was not asked to state the contents of the letter, and no offer was made to show what its contents were, it does not appear that any prejudicial error was committed in sustaining an objection to the preliminary question. (Id.)

See Broker; Contract, 1, 2; Insurance, 1; Malicious Prosecution, 6, 7; Surety.

ANNUITY.

CONTRACT FOR ANNUITY—CONSTRUCTION.—A contract whereby a son agreed to pay to his father a monthly sum during the period of the life of the father, and further to pay said sum to his sisters Rose and Esther, "or to their order, during the period they remain single or unmarried, and said payment is to cease as soon as both are married, but the payment as aforesaid is only to be made to said Rose and Esther in case the said Rose and Esther are unmarried after the death" of the father, should be construed as requiring the payment to be made to a sister who was unmarried at the father's death, so long as she continued unmarried, although the other sister, prior to the death of the father, became and ever since has been a married woman. (Cohen v. Cohen, 534.)

APPEAL.

1. **TIME FOR FILING TRANSCRIPT—SETTLEMENT OF EXCEPTIONS.**—In an action in which a motion for a new trial will lie, the appellant has forty days after the settlement of a bill of exceptions on motion for new trial, which may be used on appeal from the judgment, in which to file his transcript on appeal; and where it appears that the time has not elapsed, and the settlement has been deferred by stipulation of the parties, a motion to dismiss the appeal on the ground that the transcript has not been filed must be denied. (San Francisco Law and Collection Company v. State of California, 354.)
2. **APPEAL BY STATE—UNDERTAKING—CONSTRUCTION OF CODE.**—Although section 1058 of the Code of Civil Procedure in terms only exempts the state from giving an undertaking on appeal when it is a party plaintiff, and does not expressly exempt it when it is a party defendant, yet, from the other terms of that section, the intention to exempt the state in all cases is clear; and where the provisions of the Code of Civil Procedure relating to undertakings on appeal, as originally passed and as last amended, were not intended to include the state, the general words of such provisions should not be held applicable to the state, unless the intention of the legislature that they should be applicable is clearly shown. (Id.)
3. **SERVICE OF NOTICE OF APPEAL—TIME FOR FILING.**—The service of a notice of appeal may precede the filing of it, and the statute

APPEAL (Continued).

does not prescribe any particular time after service within which it must be filed, and it may be filed at any time before the expiration of the time for appeal, though, when an undertaking is required, it must be filed within five days after service of the notice. (Id.)

4. **DISMISSAL OF ACTION—APPEAL UPON JUDGMENT-ROLL—PRESUMPTION—WANT OF PROSECUTION.**—Upon appeal from a judgment dismissing an action taken upon the judgment-roll alone, without any bill of exceptions, every intendment is in favor of the judgment; and in the absence of any affirmative showing to the contrary, it will be presumed that the dismissal was ordered on some good ground, and in conformity with the rules of law. Where the record permits, a reasonable inference will be indulged that the dismissal was for failure to prosecute the action with reasonable diligence. (*Woods v. Diepenbrock*, 55.) .
5. **APPEAL FROM JUDGMENT—MOTION TO DISMISS—FAILURE TO FILE TRANSCRIPT—SETTLEMENT OF STATEMENT—MOTION FOR NEW TRIAL UPON MINUTES.**—A motion to dismiss an appeal from the judgment for failure to file the transcript will be denied, though more than forty days have elapsed after the perfecting of the appeal, where the transcript was filed within forty days after the settlement of a statement on motion for a new trial was made upon the minutes of the court, notwithstanding more than sixty days had elapsed after the entry of the order denying the new trial, before the statement was settled, and no appeal was taken from the order. (*Vinson v. Los Angeles Pacific Railroad Company*, 151.)
6. **INDEPENDENT RIGHTS OF APPEAL—USE OF SETTLED STATEMENT.**—The right of a litigant to appeal from the judgment, and his right to appeal from an order refusing a new trial, are distinct and separate rights. A party appealing from the judgment has an independent right under section 950 of the Code of Civil Procedure, to have settled a statement of the case to be used upon such appeal, which is not limited by the existence of an appeal or right of appeal from the order refusing a new trial. (Id.)
7. **REVIEW OF EVIDENCE—SUFFICIENCY OF SPECIFICATIONS—GENERAL FINDINGS—ISSUES JOINED—CASE OVERRULED.**—A specification of insufficiency of the evidence to support the findings is sufficient where it points to a particular finding, or if the motion for a new trial is directed against a general verdict or an *omnibus* finding that all or certain allegations of the complaint or answer are true, or, if there are no findings, the specification need be no more specific than the issues distinctly made by the pleadings. [*De Molera v. Martin*, 120 Cal. 544, is overruled so far as holding to the contrary.] (*Harris v. Duarte*, 497.)
8. **ACTION TO QUIET TITLE—ULTIMATE FINDINGS AS TO OWNERSHIP—GENERAL SPECIFICATIONS.**—In an action to quiet title, where the

APPEAL (Continued).

findings are merely general as to the ultimate facts of ownership by the defendants, and that plaintiff did not have title to the premises, specifications of insufficiency of the evidence to support each of these findings as made are sufficient to entitle the plaintiff to a review of the evidence upon appeal. (Id.)

9. JUDGMENT FORECLOSING CERTIFICATE OF PURCHASE—MOTION OF ASSIGNEE TO VACATE—AFFIDAVIT NOT PART OF RECORD—PRESUMPTION.—Upon appeal from an order denying the motion of an assignee of a certificate of purchase of school land to vacate a judgment foreclosing the certificate of purchase, for a defective affidavit for publication of summons, where the only proof that she was such assignee is an affidavit not embodied in any bill of exceptions, but merely certified by the clerk, the affidavit is no part of the record, and cannot be considered for any purpose. There being nothing in this court to show that appellant was a party aggrieved, or had any interest in the controversy, or any right to make the motion, it must be presumed the motion was properly denied. (People v. Gay, 41.)
10. ORDER GRANTING NEW TRIAL—GROUNDS—OPINION OF COURT—REVIEW UPON APPEAL.—An order granting a motion for a new trial, in general terms, will be sustained upon appeal, on any tenable ground; and the fact that an opinion of the court found in the record states the point on which the court rested the order does not preclude this court from reviewing the case and sustaining the order on other grounds. (Simon Newman Co. v. Lassing, 174.)
11. PLEADINGS, FINDINGS, AND JUDGMENT, NOT REVIEWABLE.—Upon appeal from an order granting a new trial, the insufficiency of the pleadings or of the findings to support the judgment cannot be considered. (Id.)
12. DISMISSAL OF ACTION—DELAY IN RETURN OF SUMMONS—MINUTE ORDER—FINAL JUDGMENT.—An order entered in the minutes of the court for the dismissal of an action for failure to return the summons within three years, under subdivision 7 of section 581 of the Code of Civil Procedure, is a final judgment, for the purpose of appeal therefrom. (Pacific Paving Company v. Vizelich, 4.)
13. ERRONEOUS DISMISSAL—APPEARANCE OF PARTY SERVED—PRESUMED AUTHORITY OF ATTORNEYS—DELAY OF ATTACK—ESTOPPEL.—The dismissal of the action for failure to return the summons was erroneous, and the moving party was estopped from urging it, as against the plaintiff, where such party was promptly served with summons, and attorneys promptly appear for him who are presumed to have had authority to represent him, and whose authority the plaintiff could not question, and who stipulated in his behalf with the plaintiff that the case should abide the result of another similar action, and whose authority to act for the moving party was not assailed by him until after the lapse of more than five years, during which time the plaintiff had delayed to return the

APPEAL (Continued).

summons on the strength of the appearance for him, upon which the plaintiff was entitled to rely. (Id.)

14. **SUFFICIENCY OF COMPLAINT—MOTION TO DISMISS.**—The sufficiency of the complaint to state a cause of action is not available on a motion to dismiss the complaint, and cannot be considered upon appeal from an order granting the motion. (Id.)
15. **ORDER REFUSING TO SET ASIDE STIPULATION—RENEWAL OF MOTION.** An order refusing to set aside the stipulation is not appealable, and is reviewable only on appeal from the final judgment by the moving party, and the motion to set it aside may be renewed before such appeal is taken, after reversal of a judgment dismissing the action as to him. (Id.)

See Certiorari; Costs, 1; Criminal Law, 18; Election, 4; Eminent Domain, 2, 3; Estates of Deceased Persons, 17, 18, 24, 25; Estoppel; Findings, 1, 3-5; Instructions, 1; Judgment, 1, 2, 5; Justice's Court, 3; New Trial, 1, 10-13, 19; Place of Trial, 1; Prohibition.

ASSAULT. See Criminal Law, 4.

ASSIGNMENT.

ASSIGNMENT OF BANK ACCOUNT—DELIVERY OF BOOK—WILL.—An instrument executed by a person about to die, a few days before his death, stating that "for services rendered, I, the undersigned, leave to Mrs. McCloskey, the balance of my account with the German Savings and Loan Society," specifying the amount, together with the concurrent delivery to her of the bank-book showing the account referred to, evidences a present assignment of the bank account, and not a disposition of a testamentary nature, to take effect only at the death of the signer of the instrument. (McCloskey v. Tierney, 101.)

See Mechanics' Liens, 5; Unlawful Detainer, 2-4.

ATTACHMENT. See Building and Loan Associations.

ATTORNEY AND CLIENT. See Appeal, 13.

BANKS. See Assignment.

BILL OF EXCEPTIONS. See Appeal, 1, 4-6, 9.

BILL OF LADING. See Guaranty.

BILL OF PARTICULARS.

ACTION FOR GOODS SOLD—SERVICE AFTER STATUTORY TIME—EVIDENCE—DISCRETION.—In an action for goods sold, where the defendant demanded a bill of particulars, which was furnished after the lapse of

BILL OF PARTICULARS (Continued).

the statutory period, but was served more than a month before the trial, where no objection was made to its form, or completeness, but only that it was filed too late, the defendant has not an absolute right to exclude evidence for the plaintiff, but the allowance thereof was within the discretion of the court. (*Silva v. Bair*, 599.)

BONA FIDE PURCHASER. See Claim and Delivery.

BOND. See Surety.

BOUNDARY. See Swamp and Overflowed Lands.

BROKER.

1. **BROKER'S SALE OF REAL ESTATE—COMMISSIONS—ADMINISTRATION SALE—STATUTE OF FRAUDS—AMENDMENT OF ANSWER—CHANGE OF ADMISSION TO DENIAL.**—An answer to an action by a real estate agent to recover commissions for the sale of real estate, which admitted the contract, and pleaded that it was made by her as administratrix of the estate of a deceased person, and not otherwise, and which also alleged for a separate defense that the contract was oral, and was void under the statute of frauds, specially pleaded, does not admit the validity of the contract; and it was not an abuse of discretion to allow an amendment at the trial of the first part of the answer so as to deny the existence of the contract, and thus remove a possible ambiguity in the answer. (*Jamison v. Hyde*, 109.)
2. **ADMISSION OF CONTRACT—PLEA OF STATUTE OF FRAUDS.**—The answer admitting the contract alleged did not waive the protection of the statute of frauds, where the contract was expressly alleged to have been oral, and the statute of frauds was specially pleaded. In such case the rights of the defendant stood as if no admission had been made or amendment allowed. (*Id.*)
3. **BURDEN OF PROOF—NONSUIT.**—The burden of proof under the original answer was upon the plaintiff to prove a contract in writing, and where no such proof was made, and after amendment of the answer the plaintiff was allowed an opportunity to introduce further proof, but produced none, a nonsuit was properly granted. (*Id.*)
4. **REASONABLE VALUE OF SERVICES NOT RECOVERABLE.**—Where there was no contract in writing for the employment of the plaintiff to sell the real estate, plaintiff was not entitled to recover the reasonable value of his services in selling it. (*Id.*)
5. **VENDOR AND PURCHASER—SALE BY REAL ESTATE AGENT—PERFORMANCE—COMMISSION—RATIFICATION—REFUSAL TO COMPLETE SALE.**—Where the owner of real estate made a contract with a real-estate agent to effect a sale thereof, and the contract fixed the right of

BROKER (Continued).

the agent to a commission upon his sale, the agent has performed his part of the contract by producing a purchaser able and willing to buy, and the owner's liability for the commission agreed upon is then complete; and where the owner ratified and approved the sale in writing, the commission cannot be avoided by any arbitrary or wanton refusal by him to consummate the sale. (*Merriman v. Wickersham*, 567.)

6. **ACTION BY CORPORATION—SUBSTITUTION OF EXECUTOR—EVIDENCE—OFFICER AND STOCKHOLDER NOT DISQUALIFIED.**—Where the real-estate agent employed was a corporation, and pending suit for the commission the executor of the deceased owner was substituted as a party defendant, an officer, and one of the principal stockholders, of the corporation is not disqualified as a witness, under section 1880 of the Code of Civil Procedure, as being a party to the action; and where it was not established that he was a "person in whose behalf the action was prosecuted," his testimony to facts occurring before the death of the owner was properly admitted. (*Id.*)

See Agency, 1.

BUILDING AND LOAN ASSOCIATIONS.

1. **ATTACHMENT LIEN—REPORT OF COMMISSIONERS TO ATTORNEY-GENERAL—SUBSEQUENT ACTION.**—The property of a building and loan association is subject to attachment by any creditor thereof, at any time prior to the commencement of an action by the attorney-general to enjoin it from doing business; and the lien of an attachment upon its real estate is not affected by a prior report of the commissioners to the attorney-general that the association was doing business in an unsafe manner. (*Bories v. Union Building and Loan Association*, 74.)
2. **SUBSEQUENT POSSESSION OF RECEIVERS—EXISTING LIENS NOT AFFECTED.**—The subsequent possession of receivers appointed by the court cannot affect the existing lien of the attachment. The appointment of a receiver works no injury to the least right of any one; but the receiver is the hand of the law, which preserves and enforces rights, and never destroys them. The receiver's possession is subject to all valid and existing liens upon the property at the time of his appointment. (*Id.*)
3. **ATTACHMENT LIEN — COSTS — INJUNCTION — PETITION OF STOCKHOLDER—RECEIVERS.**—An attachment upon a note of a building and loan association, levied upon its land, before the commencement of an injunction suit by the attorney-general to restrain its business, creates a valid lien for the amount of the note and costs of suit, which is not affected by the injunction suit; and subsequent receivers appointed upon petition of a stockholder of the association to wind up its business, took the attached property charged with the lien of the attachment. (*Bories v. Union Building and Loan Association*, 79.)

BUILDING AND LOAN ASSOCIATIONS (Continued).

4. **SALE OF ATTACHED PROPERTY—LIEN UPON PROCEEDS—PRO RATA DISTRIBUTION.**—Upon a sale of the attached property by the receivers, the proceeds were still charged with the lien for the amount of the note and costs of the attachment suit, and must be applied by the receivers in payment thereof in full, if sufficient; and the claimant of the lien can only be made to share with unsecured creditors in a *pro rata* distribution of assets, as to the amount of any unsecured deficiency. (Id.)
5. **IMPROPER DISTINCTION AS TO CLAIMS—MONEY LOANED—NOTE FOR DEBT—ERRONEOUS JUDGMENT.**—There is no ground for the distinction in the judgment of the superior court in allowing claims in full for "cash money loaned" to the association, and in rejecting the validity of the attachment levy of appellant upon a note given in discharge of a debt or liability of the association for a given sum, due for the surrender of stock worth the face value of the note, and ordering the note paid *pro rata* with other creditors, after full satisfaction of all claims for cash money loaned to the corporation. The court was not justified in putting all claims for money loaned in a preferred class to be paid in full. (Id.)

BURGLARY. See Criminal Law, 7, 8.

CARRIERS. See Railroads.

CERTIORARI.

MUNICIPAL ORDINANCE—VALIDITY—CONVICTION IN POLICE COURT—AFFIRMANCE UPON APPEAL.—The writ of *certiorari* will not lie to determine the validity of a municipal ordinance properly involved in an appeal taken to the superior court from a judgment of conviction of a violation thereof in the police court which has been affirmed upon said appeal. The writ only lies where there is no remedy by appeal, and will not lie either where such remedy has been lost by laches or where a judgment has been affirmed upon appeal. (Valentine v. Police Court of City and County of San Francisco, 615.)

See Justice's Court, 2.

CLAIM AND DELIVERY.

1. **RIGHT OF POSSESSION OF PRUNE CROP—CONTRACT FOR POSSESSION AND SALE—DELIVERY TO AGENT—RETAKING BY DEFENDANTS.**—Where the defendant brothers made a contract for the exclusive possession and right of possession of their prune crop by the plaintiff, which was to undertake the inspection, packing, and sale thereof for the highest obtainable prices, and delivered the crop to plaintiff's agent for packing on account of plaintiff, and afterward retook the possession thereof, the facts show that the plaintiff had the possession and right of possession of the prunes when so retaken,

CLAIM AND DELIVERY (Continued).

and had the right of possession under the contract at the time of the commencement of an action for claim and delivery of the prune crop. (California Cured Fruit Association v. Stelling, 713.)

2. **RIGHT OF PROPERTY—DUTY OF PLAINTIFF TO ACCOUNT.**—The right of possession of the plaintiff under the contract did not carry with it the right of property; and the plaintiff must comply with its contract, and account to defendants for the proceeds of sale of the prunes. (Id.)
3. **DEFENSE—TRANSFER TO CO-DEFENDANT—BONA FIDE PURCHASE NOT SHOWN—EQUITABLE INTEREST—SUBJECTION TO RIGHTS OF PLAINTIFF.**—A transfer of the prune crop by the defendant brothers to a co-defendant, who was their father, does not entitle him to protection as a *bona fide* purchaser, where there was no proof of the payment of purchase money therefor in good faith by the father, nor that he was without notice of all the facts; nor does the rule as to *bona fide* purchasers extend to the assignment of an equitable interest. The defendant father stands in no better position than his co-defendants, who could only convey their rights subject to the contract rights of the plaintiff. (Id.)
4. **DEMAND BEFORE SUIT, WHEN UNNECESSARY.**—Where the prunes taken by defendants from the possession of the plaintiff before suit, and transferred by them to their co-defendant, were, in the action of claim and delivery, demanded by them to be returned to such co-defendant as owner, it is evident that a demand by the plaintiff upon the defendants for the possession of the prunes before suit would have been unavailing, and it was therefore unnecessary. (Id.)
5. **EVIDENCE—CONSIDERATION FOR TRANSFER—ABSENCE OF NOTICE NOT CLAIMED.**—It was not error to exclude proof of a greater consideration than that expressed in the transfer where it was not claimed that the transferee bought without notice of the facts. (Id.)
6. **CONTRACTS WITH CORPORATIONS—COLLATERAL ATTACK UPON CORPORATIONS—ESTOPPEL.**—Where the defendants made the contract with plaintiff and its agent as corporations, they will not be allowed by way of collateral attack to deny that they were such corporations. (Id.)
7. **VALIDITY OF CONTRACTS.**—The defendants will not be allowed in the action for claim and delivery, which involves only the validity of the contracts so far as performed, and is not an action to enforce the contracts, nor to compel the performance of them, to raise questions as to whether they are in restraint of trade or against public policy. There is no question of public policy or restraint of trade in restoring the parties to the position in which they had by mutual agreement placed themselves. (Id.)
8. **RECOVERY OF POSSESSION—ERROR IN ALTERNATIVE JUDGMENT FOR VALUE IMMATERIAL.**—Where the plaintiff gave a bond and retask

CLAIM AND DELIVERY (Continued).

possession of the prunes, and retained the same, the alternative judgment for value is immaterial, though for too large an amount. (Id.)

9. **CONTRACTS OF PARTIES—PUBLIC POLICY.**—Parties should be careful about making contracts and creating agents, but when once made the courts will not relieve them for light or trivial reasons. Public policy is better served by leaving the parties and their rights to be measured by the terms of their contracts. (Id.)

COMMUNITY PROPERTY. See Trusts, 5, 6.

CONDEMNATION. See Eminent Domain; Irrigation District, 2.

CONSTITUTIONAL LAW. See Criminal Law, 26, 27; Elections, 9; Municipal Corporations, 1; Newspapers, 1; Office and Officers 13.

CONTRACT.

1. **ACTION FOR BREACH OF CONTRACT—NEGLIGENCE IN HANDLING PRUNE CROP—VERDICT FOR DAMAGES—SUFFICIENCY OF EVIDENCE.**—Where there is ample evidence in the record to show a negligent breach of a contract by the defendant to dry, cure, and pack plaintiff's prune crop, to the damage of the plaintiff in the amount awarded for such negligence by the jury, who heard all the testimony and found the truth of the testimony as to such negligence, which was also passed upon by the judge in denying defendants' motion for a new trial, the verdict for the plaintiff will not be disturbed upon appeal for insufficiency of the evidence. (Arnold v. Producers' Fruit Company, 738.)
2. **CONTRACT FOR SALE OF PRUNES BY DEFENDANT—EVIDENCE—OPPORTUNITY OF PLAINTIFF.**—Where by the terms of the contract the defendant had the right to sell the prunes, and the plaintiff was not allowed to sell any portion of it except through the defendant, and by paying its commission, evidence was not admissible to show that prior to the damage caused by defendant to the prunes, the plaintiff had an opportunity to sell them for the market price. (Id.)
3. **COMPARISON OF PRUNES—IRRELEVANT EVIDENCE.**—Evidence that plaintiff exhibited samples of prunes taken from another county, for the purpose of making a comparison with plaintiff's prunes, was irrelevant. (Id.)
4. **SALES OF OTHER PRUNES.**—Evidence as to the price received by the defendant for the sales of other prunes than those of plaintiff, at a time two months earlier than the sale of plaintiff's prunes, was not competent to prove any issue in the case. (Id.)
5. **INSTRUCTION—MEASURE OF DAMAGES—REDIPPING OF PRUNES.**—There was no error in instructing the jury that if they "find that the defendant did not use ordinary diligence, skill, or care in drying, curing, packing, and handling said fruit, the damage to plaintiff

CONTRACT (Continued).

is the difference between the market value of such fruit at the time of sale, had ordinary diligence, skill, and care been used by defendant, in drying, curing, packing, and handling the same, and the sum for which the same was sold," where no evidence appears in the record to show a different measure of damages, on account of a redipping of the prunes, the date of which does not appear, and which may have been just completed at the time of sale. (Id.)

6. **GAS COMPANY—CONTRACT FOR CONTINUOUS RATE—OSTENSIBLE AGENCY—KNOWLEDGE OF COMPANY.**—Where a contract for the supply of gas at a specified rate by the corporation defendant to the plaintiff would not be entered into by plaintiff unless the defendant agreed to supply gas at that rate so long as it was used in plaintiff's hotel, and the agent of defendant seeking to obtain the contract modified it accordingly, whereupon plaintiff signed it, and it was delivered to the company without actual information to it of such modification, such agent had ostensible, if not actual, authority to modify the contract, and the defendant, which received the contract as so modified, must be charged with knowledge of all of its provisions, of which it had the means of knowledge, though it carelessly and negligently deprived itself of such means by filing away the contract without noticing the modification, which was distinctly legible. (*Gallagher v. Equitable Gas Light Company*, 699.)
7. **NEW PROPOSAL—RATIFICATION OR MODIFICATION.**—If the change made by defendant's agent to suit the plaintiff may be regarded as a rejection of the contract as originally proposed by defendant to plaintiff, and as a new proposal by plaintiff, the voluntary acceptance of the proposal by the defendant, and its action under it, constituted it a contract binding upon the defendant. (Id.)
8. **VALIDITY OF CONTRACT AS MADE—CONSIDERATION—MUTUALITY.**—Where it appeared that the plaintiff agreed to take gas from the defendant in his hotel, and agreed to discontinue the use of electricity therein, and incurred expense for gas-fixture, the facts show a consideration for the contract for supply of the gas at the specified rate so long as using it in his hotel, and it was not necessary to mutuality that the contract should name a definite period of time for its continuance; and so long as plaintiff took the gas defendant could compel payment at the agreed rate. (Id.)
9. **MUTUALITY OF PERFORMANCE—ACTION—OBLIGATION OF PLAINTIFF.**—Where the contract was mutually performed for several months, the commencement of an action by the plaintiff to enjoin the discontinuance of gas under the contract by the defendant put the plaintiff under the obligation of the contract. (Id.)
10. **OBLIGATION OF GAS COMPANY—PERFORMANCE OF CONTRACT BY CONSUMER—INJUNCTION MAINTAINABLE.**—The obligation of the gas company to supply property-owners with gas results from the statute, and not from contract; but where it has made a contract fixing a rate the provisions of section 632 of the Civil Code imply that the

CONTRACT (Continued).

gas corporation cannot shut off the supply of gas so long as the consumer does not refuse to pay for the gas supplied by the corporation, "as required by his contract," and the contract being shown, and plaintiff having complied fully with its terms, and averring readiness to continue to take gas and ability to pay for it, injunction will lie. (Id.)

11. **ENFORCEMENT OF CONTRACT UNDER STATUTE—SPECIFIC PERFORMANCE—SUPPORT OF INJUNCTION.**—The enforcement of the contract for gas as to the rate and continuance of rate agreed upon, under our statute, in a suit to enjoin its discontinuance, is not an action for specific performance in the strict sense. It does not follow that an injunction will not lie because specific performance cannot be enforced. It is sufficient to support the injunction that there is no complete and adequate remedy at law. (Id.)

See Agency, 1, 2; Annuity; Broker, 1-5; Claim and Delivery; Grant; Landlord and Tenant, 4-6; Mechanics' Liens; Place of Trial, 2, 3; Pleading, 4, 5; Railroads; Trusts, 6; Vendor and Vendee.

CORPORATIONS.

1. **INVALID EXECUTION OF NOTE AND MORTGAGE—RATIFICATION.**—Where a note and mortgage of a corporation were both invalid because not authorized at a meeting of the board of directors duly assembled, the requirements of the law for ratifying the note and the mortgage are essentially different. The mortgage can only be authorized or ratified in writing in conformity with law; but authority to execute the note may be oral, and its execution may be ratified by acts *in pais*. (Curtin v. Salmon River Hydraulic Gold Mining and Ditch Company, 308.)
2. **FACTS SHOWING RATIFICATION OF NOTE—ESTOPPEL IN PAIS.**—Where the transaction of the note and mortgage was fully entered upon the books of the corporation, notice of the note was imparted to it; and where, with such notice, it received and retained the benefits of the loan evidenced by the note, and with knowledge, and by long-continued silence, acquiesced in the contract, and never attempted or offered to rescind it, nor to restore the consideration, it must be held to have ratified the note, and an estoppel *in pais* is raised by its conduct to dispute the enforcement of the note against it. (Id.)
3. **SEPARATE ACTION UPON NOTE—JUDGMENT IN FORECLOSURE SUIT NOT A BAR.**—A judgment in a former suit to foreclose an invalid mortgage which failed because the security was held to be void, is not a bar to a separate action on the note, in which the note is shown to have been ratified by the conduct of the corporation. (Id.)

See Broker, 6; Building and Loan Associations; Claim and Delivery, 6; Gas Companies; Municipal Corporations; Place of Trial, 2, 3; Water and Water Rights, 23-27.

COSTS.

1. **ESTATES OF DECEASED PERSONS—JUDGMENT DISMISSING PETITION—AMENDMENT NUNC PRO TUNC—TIME FOR APPEAL.**—Where a judgment dismissing a petition against an administrator for the specific performance of a contract of sale made by the decedent was subsequently amended *nunc pro tunc*, so as to tax the costs against the petitioner, an appeal will lie from the judgment as amended within sixty days after the date of the amendment. (*Estate of Potter*, 424.)
2. **POWER OF COURT AS TO COSTS NOT ASKED—SILENCE OF JUDGMENT—AMENDMENT.**—Though the court had discretion as to costs upon the dismissal of such petition, yet where costs were not prayed for in the answer, and the judgment was advisedly silent as to costs, the court had no power at a subsequent time to amend the judgment *nunc pro tunc* so as to include costs not originally contemplated. (*Id.*)

See *Estates of Deceased Persons*, 24, 28, 30, 31; *Judgment*, 2, 5; *Mechanics' Liens*, 6; *Office and Officers*, 10.

COUNTIES.

COUNTY GOVERNMENT ACT—"BUILDINGS" BY COUNTY—"FENCE"—DUTY TO ADVERTISE FOR BIDS—PROHIBITION.—Under the provisions of the County Government Act, requiring that all necessary "buildings must be erected by contract let to the lowest responsible bidder," after a required notice by publication, the term "buildings" is intended to include the erection of an iron "fence" around the grounds upon which the courthouse of the county is situated. It is the duty of the supervisors of the county to advertise for bids, and let the erection of such fence to the lowest bidder; and prohibition will lie to prevent the enforcement of a contract for its erection to a bidder without such advertisement and letting. (*Swasey v. County of Shasta*, 392.)

See *Nuisance*, 1, 2; *Office and Officers*, 1-4, 13.

COURTS. See *Justice's Court*.

CRIMINAL LAW.

1. **MOTION TO SET ASIDE INFORMATION—SIGNATURE TO COMPLAINT—MARK—ATTESTATION—JURAT OF JUSTICE.**—Upon a motion to set aside an information for insufficiency of the signature to the complaint for arrest of the defendant, a signature by the mark of the complainant, made after his initials and before his surname, accompanied by the jurat of the justice of the peace that the complaint was subscribed and sworn to before him, will be deemed sufficient. It will be presumed that the name of the complainant, written near the mark, was written by the justice; and his signature to the jurat was a sufficient attestation of the mark. (*People v. McDaniel*, 113.)

CRIMINAL LAW (Continued).

2. **SUFFICIENCY OF INFORMATION—LANGUAGE OF STATUTE—QUALIFICATION OF RULE.**—The general rule that it is sufficient in an information to charge an offense in the language of the statute is subject to the qualification that where a more particular statement of facts is necessary in order to charge the offense definitely and certainly, it must be made. (*People v. Perales*, 581.)
3. **GENERAL WORDS OF STATUTE.**—Where the words or terms used in the statute have no technical or precise meanings which of themselves imply the offense, or where the particular facts or acts which constitute it are not specified, but from the general language used many things may be done which may constitute an offense, it is necessary to set forth the particular things or acts done with reasonable certainty and distinctness. (*Id.*)
4. **ASSAULT “BY MEANS LIKELY TO PRODUCE GREAT BODILY INJURY” —“HEAVY WOODEN STICK.”**—An information charging the defendant generally with the crime of assault “by means likely to produce great bodily injury, to wit, with a heavy wooden stick,” is not a sufficient designation of the offense. The word “heavy” is too indefinite, and there is no description as to the weight, strength, or size of the stick, or other qualities, properties, or characteristics, showing that it was a means likely to produce great bodily injury. (*Id.*)
5. **FELONY—JUDGMENT—AMENDMENT NUNC PRO TUNC—POWER OF COURT.**—The inherent right and power of a court to cause its record to be amended in accordance with the facts, where the record made by the clerk is incorrect, exists in criminal as well as civil cases; and where a defective minute entry of a judgment for imprisonment in the state prison, rendered upon conviction of felony embezzlement, afforded sufficient evidence to justify an order *nunc pro tunc* correcting the defects therein, such order will be affirmed upon appeal therefrom. (*People v. Ward*, 628.)
6. **EVIDENCE—CROSS-EXAMINATION OF DEFENDANT.**—A defendant in a criminal case who has by his testimony in chief contradicted the evidence for the prosecution may be cross-examined with reference to all facts or denials necessarily implied from his testimony in chief, as well as with respect to the facts expressly stated by him in such testimony; and the cross-examination is not limited by the exact period of time fixed by the testimony in chief, but may extend to the whole transaction of which he gives a part, and which occurred in immediate connection with the part which he relates, shortly before, or after, and in which he must have been concerned, and of which he may be reasonably supposed to have had knowledge. (*People v. Teshara*, 633.)
7. **BURGLARY—TESTIMONY OF CO-DEFENDANT—CROSS-EXAMINATION—ENTRY IN MEMORANDUM-BOOK.**—Upon a prosecution for burglary, where a defendant, jointly indicted with the appealing defendant, testified that he alone had committed the burglary, and that he had

CRIMINAL LAW (Continued).

not seen the appellant after the next morning until he met him in Peoria, Illinois, where both of them were arrested, it was proper on cross-examination to show to the witness a memorandum-book kept by him as a diary, and to ask him if a memorandum therein appearing, to the effect that he and appellant left together the next day, was not in his handwriting, and after he had repeatedly denied that it was, it was not prejudicial error to allow the prosecution to ask him directly and pointedly whether the entry was not made by him. (*People v. Dowell*, 493.)

8. **ERRONEOUS INSTRUCTION—INTOXICATION AS AFFECTING DEGREE—HARMLESS ERROR.**—Upon a prosecution for burglary, the degree of the crime is fixed solely by the time of the commission, whether at night or in the daytime; and it was erroneous to instruct the jury that "evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of the crime." But where the sole defense was, that the defendant did not commit or aid in the burglary, and the defendant did not claim that he was intoxicated to such a degree as to render him incapable of forming a criminal intention, but assumed to give a full account of all that transpired with minute detail, and requested an instruction on the question of the effect of intoxication, he was not prejudiced by the error. (*Id.*)
9. **INCEST—SUFFICIENCY OF INFORMATION.**—An information for incest, charging that the defendant did willfully, unlawfully, and feloniously have sexual intercourse with a certain female child named, she being then and there the daughter of the defendant, fully apprised the defendant of the charge he was called upon to meet, and is sufficient. (*People v. Stratton*, 604.)
10. **EVIDENCE OF DAUGHTER—FORCED SEXUAL INTERCOURSE.**—Evidence of the daughter with whom the sexual intercourse was had by the defendant was admissible to prove frequent and repeated acts of sexual intercourse forced upon her by her father. (*Id.*)
11. **CROSS-EXAMINATION—INTERCOURSE WITH OTHER PERSONS.**—A question asked upon cross-examination of the daughter, whether she had had sexual intercourse with other persons, was properly disallowed. Such proof would not tend to mitigate the offense. (*Id.*)
12. **TESTIMONY OF PHYSICIAN—CONDITION OF DAUGHTER—CORROBORATION OF HER TESTIMONY—REBUTTAL.**—The testimony of a physician, received subsequently to the daughter's testimony, that her sexual organs were in the condition of those of a married woman, was competent and admissible, without regard to its weight, as tending to corroborate the daughter's testimony. It would then have been competent for defendant to have recalled the daughter, and to have shown by her or other competent means that she had permitted other persons to have sexual intercourse with her, in disproof of the fact that the condition of her sexual organs was caused by her father, though no such offer or attempt was made. (*Id.*)

CRIMINAL LAW (Continued).

13. **INSTRUCTION—ABSENCE OF CONSENT TO INCEST—CRIME NOT CHANGED BY FORCE—RAPE—CRIMINAL INTENT OF DEFENDANT.**—It was proper to instruct the jury that "the consent of both parties is not essential to the crime of incest," and that "if the party charged have sexual intercourse with a female within the degree of consanguinity within which marriage is prohibited, he is guilty of the crime of incest, whether the intercourse was with or without the consent of such female." Where both the circumstances of force and consanguinity are present, it is not less incest because the element of rape is added; and the guilt of the defendant of the crime charged is measured by his knowledge and intent, and not by the knowledge and intent of any other person. (Id.)
14. **PROSECUTRIX, WHEN AN ACCOMPLICE—PRESENCE OR ABSENCE OF CONSENT—QUESTION FOR JURY.**—If a prosecutrix, being of the legal age of consent, consents to the sexual intercourse, her testimony, like that of any accomplice, if not corroborated, is insufficient to convict; but if she is the victim of force, fraud, or undue influence, so that she does not willfully and willingly join in the incestuous act, she cannot be regarded as an accomplice. In this case the instructions fairly left the matter open to the determination of the jury. (Id.)
15. **TRIAL—CONTINUANCE—DISCRETION.**—In a criminal case a motion of the defendant for a continuance of the trial for the absence of a witness rests very much in the discretion of the trial court; and it is only in a plain case of the abuse of such discretion that this court will interfere. (People v. Chutnacut, 682.)
16. **GRAND LARCENY—STEALING OF COW—ALIBI OF ALLEGED CONSPIRATOR—IMPEACHMENT.**—Where the defendant was accused of grand larceny in the stealing of a cow, an affidavit for a continuance, stating that the prosecution claimed that the defendant, who is an Indian, and one Syvoymoit, with two other Indians, stole the cow, and that the defendant expected to prove by absent witnesses an alibi as to Syvoymoit, who was not a defendant, and was not being tried, shows no materiality of the evidence, unless it be for purposes of conditional impeachment; and the court did not abuse its discretion in denying the continuance. (Id.)
17. **CHALLENGE TO JUROR—ACTUAL BIAS.**—Where a juror was challenged for actual bias against the defendant as an Indian, but the evidence in the record shows to the contrary, the challenge was properly denied. (Id.)
18. **APPEAL—REVIEW OF INSTRUCTIONS—INSUFFICIENT ARGUMENT.**—It is not the duty of this court to look at instructions refused which are referred to merely by folios, and to examine sections of the code referred to merely by number to discover error, where the counsel for appellant will not take the time to point out the particu-

CRIMINAL LAW (Continued).

lar instructions refused upon which he predicates error and the law which he invokes to show error. (Id.)

19. **GRAND LARCENY—THEFT OF CARPETS—EVIDENCE—FALSEHOOD OF DEFENDANT—CONSCIOUSNESS OF GUILT.**—Upon a prosecution for grand larceny, in stealing carpets belonging to a furniture company, where it is proved that defendant, while acting as shipping clerk for the company, delivered the carpets to one B. at the back door of the store, at six o'clock in the morning, evidence is admissible to show that soon after the company discovered the loss of the carpets the defendant, when confronted with B., who recited the facts, denied the delivery of the carpets to B., and declared that he did not know B. Deception, falsehood and fabrication as to the facts of the case are admissible on the same theory as flight and concealment of the person charged with crime, as tending to show consciousness of guilt and criminal intent. (People v. Cole, 88.)
20. **GENERAL OBJECTION TO QUESTION—REASONS FOR ARREST—MATTER OF HEARSAY AND ARGUMENT—WAIVER OF SPECIFIC OBJECTION—APPEAL.**—A general objection to a question asked from a representative of the furniture company as to his reasons for arresting the defendant, on the ground that it was irrelevant, incompetent, and hearsay, was properly overruled, as it could not be anticipated that the answer would contain objectionable matter, and where matter of knowledge was stated and also matter of hearsay, and argumentative statements mingled with declarations as to his suspicions, which were given without further specific objection, or any motion made to strike out the objectionable matter, objection thereto is waived, and cannot be urged upon appeal for the first time. (Id.)
21. **MURDER—INSANITY—EVIDENCE—OBSERVATION OF WITNESSES.**—Upon a prosecution for murder, where the defense was insanity, and it appeared that the defendant more than one month prior to the homicide had received a severe injury to his head, and there was evidence tending to show a concussion of the brain and a derangement of his mental faculties; it was error in such case to refuse to allow witnesses not intimate acquaintances within the meaning of subdivision 10 of section 1870 of the Code of Civil Procedure to testify to their observation of his acts and conduct at various times between the time of such injury and the time of the homicide, and to his appearance at those times as being rational or irrational, or acting rationally or irrationally. (People v. Manoogian, 592.)
22. **OPINION OF "INTIMATE ACQUAINTANCE"—DISCRETION OF COURT.**—The question whether a witness is such an "intimate acquaintance" as to be allowed to give his opinion on the general question of sanity or insanity is from its nature peculiarly addressed to the discretion of the trial court, and the appellate court will not interpose, unless there is a clear abuse of discretion. (Id.)
23. **INSTRUCTION—CAUTION AGAINST COUNTERFEIT OF INSANITY.**—An instruction taken verbatim from a decision of this court, and designed

CRIMINAL LAW (Continued).

- to caution the jury against being imposed upon by an "ingenious counterfeit of insanity," though it would be better omitted, will not be held prejudicially erroneous. (Id.)
24. **REFUSAL OF PROPER INSTRUCTION—MENTAL DELUSION.**—Under the circumstances shown by the record a requested instruction upon the subject of insanity or mental delusion as to a particular matter which is not erroneous should have been given. (Id.)
25. **SELF-DEFENSE—IRRELEVANT MATTER—EVIDENCE—REFUSAL OF INSTRUCTION.**—Where there was no question or evidence of self-defense, any error in excluding evidence as to the position of the hands of the deceased at the time of the homicide which had no relevance except upon that question was without prejudice; and it was proper to refuse a requested instruction upon the law of self-defense. (Id.)
26. **PLEA OF GUILTY—DETERMINATION OF DEGREE BY THE COURT—CONSTITUTIONAL LAW—TRIAL.**—Section 1192 of the Penal Code, conferring upon the court the power to determine the degree of a crime upon a plea of guilty, is not unconstitutional as being violative of the provisions of the state and federal constitutions for the right of trial of all crimes by jury. The proceeding for such determination is not a trial. (People v. Chew Lan Ong, 550.)
27. **POWER OF COURT TO TAKE EVIDENCE.**—The court being vested with the power to determine the degree of the crime, it has implied power under section 187 of the Code of Civil Procedure to take evidence to aid in such determination; and it is not a tenable objection to section 1192 of the Penal Code that it does not provide any mode by which the court is to reach the determination, nor provide for the taking of evidence on the subject. (Id.)
28. **MURDER—JUDGMENT OF DEATH—WARRANT—DIRECTION TO WARDEN—SURPLUSAGE—DUTY OF WARDEN.**—The fact that a warrant issued to the sheriff for the execution of a defendant who has pleaded guilty of murder, and has been determined by the court to be guilty of murder in the first degree, in addition to the other provisions required to be inserted in the warrant, unnecessarily inserted a direction to the warden of the state's prison to execute the defendant, does not vitiate it. Such direction may be disregarded as surplusage. It is the duty of the warden to execute the judgment of death under the law, independent of the order of the court. (Id.)
29. **WARRANT FUNCTUS OFFICIO—ORDER TO WARDEN.**—A warrant of death becomes *functus officio* after the lapse of the time within which it directed the defendant to be executed; and an order must then be made under section 1227 of the Penal Code, after the defendant is brought before the court, expressly requiring the warden to execute the judgment at a specified time. (Id.)
30. **INSTRUCTION—"MORAL CERTAINTY."**—An instruction upon a charge of murder, that "moral certainty is described as a state of impres-

CRIMINAL LAW (Continued).

sion produced by facts in which a reasonable mind feels a sort of coercion to act in accordance with it," and that "it is also declared to be a certainty that convicts and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it," is not prejudicial to the defendant because amplifying the definition of "moral certainty" beyond section 1835 of the Code of Civil Procedure. (*People v. Lew Fook*, 548.)

81. **MURDER—CIRCUMSTANTIAL EVIDENCE—ERROR AS TO PREVIOUS DECLARATION OF WITNESS—PRIOR TESTIMONY.**—Where upon a trial for murder the testimony implicating the defendant was wholly circumstantial, and tracks leading to the place of killing corresponded with shoes found in defendant's room, and his mother, when called as a witness for the prosecution, said she could not tell positively what shoes her son had worn on the day of the killing, and that her testimony to the contrary at the preliminary examination was a mistake, it was prejudicial error to compel her to testify that at the coroner's inquest she testified that he wore those shoes during the whole day of the homicide. (*People v. Creeks*, 529.)
82. **SURPRISE—IMPEACHMENT OF ADVERSE WITNESS—MERE FAILURE OF EVIDENCE.**—It is only where a witness who has been called by a party has given damaging testimony against him, by which he has been surprised, that he is permitted to show that the witness had made contradictory statements, by way of impeachment; but where a witness called by a party has simply failed to testify to all that was expected or desired, but has not given testimony against him, it is not permissible for the party calling him to prove that such witness previously made statements which if sworn to at the trial would tend to make out a case. (*Id.*)
83. **MURDER—SELF-DEFENSE—EVIDENCE—POSSESSION OF MONEY.**—Upon a prosecution for murder, where the defendant sought to justify the killing upon a plea of self-defense, and the prosecution sought to show that the deceased had money in his cabin, and that defendant was in funds immediately thereafter, and the defendant testified that the deceased had made a demand upon him for money, evidence is admissible to show that the defendant had used part of a Chinese company's money, as pertinent in the establishment of those matters; and it was neither the intent nor the effect of such evidence to hold the defendant before the jury as an embezzler. (*People v. Leung Oek*, 323.)
84. **TEMPERAMENT AND Demeanor OF DEFENDANT.**—Where it appears that the defendant visited the witness, it was proper to ask the witness as to his actual knowledge of the temperament of the defendant,—if jovial, pleasant, talkative, or otherwise,—where it was proposed to follow the question by showing that his demeanor upon the visit he made after the homicide was different from that usual to him. (*Id.*)

CRIMINAL LAW (Continued).

35. **EXPLANATION OF EVIDENCE AT PRELIMINARY EXAMINATION.**—An objection that the court erred in refusing to allow the defendant to explain his reasons for giving different testimony at the preliminary examination from that given upon the trial was not tenable, where the court merely sustained a proper objection as to whether he gave correct testimony at that other hearing, in advance of any testimony given by him at the trial, but he was subsequently allowed to explain and did explain fully that his testimony at the preliminary hearing was false, and that he testified falsely through fear. (Id.)
36. **OBJECTION TO PRELIMINARY EXAMINATION—PURPOSE OF PRESENCE OF INTERPRETER.**—An objection that there had been no valid preliminary examination, and that the interpreter thereat was in court for the express purpose of prosecuting the defendant, was properly overruled, where, so far as the record discloses, there was a valid preliminary examination, and defendant admitted that he was informed thereat as to his right to counsel, and to have witnesses subpoenaed and examined in his behalf, and, so far as the record discloses, the interpreter was not present in court for the purpose stated. (Id.)
37. **TRIAL FOR MURDER—REFUSAL OF INSTRUCTIONS SUBSTANTIALLY GIVEN—DISCRETION OF JURY—CONFESSION AND ADMISSIONS.**—Upon the trial of a defendant charged with murder, the defendant is not prejudiced by the refusal of instructions substantially given in the charge of the court relative to the discretion of the jury in determining the penalty in case of conviction, and relative to the admissibility of an alleged confession and to considering the whole of alleged statements and admissions of the defendant. (*People v. Wardrip*, 229.)
38. **CONNECTION OF MURDER WITH BURGLARY—INAPPLICABLE INSTRUCTION.**—Where the evidence showed that if appellant killed the deceased, the killing was in immediate connection with a burglary and before flight, a requested instruction relative to a murder committed after an attempt to perpetrate a burglary, and when the party is in flight, as not being within the meaning of section 189 of the Penal Code, was properly refused as inapplicable to the evidence. (Id.)
39. **CONSIDERING ADMISSIONS WITH CAUTION—INSTRUCTION AS TO MATTER OF FACT—HARMLESS REFUSAL—COMMONPLACE MATTER.**—A requested instruction relative to the jury receiving with caution all evidence of the oral admissions of the defendant, seems, under the weight of authority, in violation of the constitutional provision against charging as to matters of fact; but without finally so deciding, the refusal of the instruction cannot be deemed ground for reversal, as it states mere commonplace matter within the general knowledge of jurors. (Id.)

CRIMINAL LAW (Continued).

40. **MURDER—SELF-DEFENSE—INSTRUCTIONS—"CLAIM" OF DEFENDANT.**—Upon the trial of a defendant charged with murder, who admitted the killing, and relied upon the excuse of self-defense, and requested instructions thereupon, it was proper for the court to preface the instructions given with the statement that they were "based upon this claim of the defendant that he acted in self-defense"; and such use of the word "claim" is not prejudicial, or open to criticism. (*People v. Glover*, 233.)
41. **APPARENT DANGER—SUFFICIENT CAUSE FOR BELIEF—INSTRUCTION PROPERLY MODIFIED.**—A requested instruction that "a person may repel force by force in the defense of person, property, or life, against one who manifestly intends or endeavors by violence or surprise to commit a known misdemeanor or felony, or either, or to do great bodily injury to his person, and the danger which would justify the defendant in the act charged against him may be either real or apparent; and the jury are not to consider whether the defendant was in actual peril of his life or property, but only whether the indications were such as to induce a reasonable man to believe that he was in such peril of person or property; and if he so believed reasonably [and had sufficient cause so to believe], and committed the act complained of under such belief, even though it should appear that the deceased was not armed, you should acquit the defendant,"—was properly modified by inserting the words "and had sufficient cause so to believe," and as so modified the instruction clearly expresses the law. (*Id.*)
42. **PROPER INSTRUCTIONS.**—Instructions upon the law of self-defense, consisting of a concise statement of the language of subdivision 3 of section 197 of the Penal Code, and of excerpts from the language of the court in *People v. Hecker*, 109 Cal. 462, were properly given. (*Id.*)
43. **SEEKING QUARREL WITH DESIGN TO CREATE NECESSITY—APPLICABILITY OF INSTRUCTION—PROVINCE OF JURY.**—An instruction that the plea of self-defense is not available where a person seeks to quarrel with the design of creating a real or apparent necessity for killing, correctly states the law, and is not erroneous, whether it is applicable or inapplicable to the evidence. Where there was evidence to which it might apply, the instruction was properly given, and it was the exclusive province of the jury to determine whether the quarrel was sought by the defendant with such design. (*Id.*)
44. **FAULT OF DEFENDANT—INSTRUCTIONS CONSTRUED TOGETHER.**—An instruction that "a defendant who justifies under a claim of self-defense must himself have been without default," and predicated the absence of fault, as a condition of being justified in acting under a belief of imminent danger, must be construed in connection with all of the instructions of which it forms a part, concerning the conditions on which the right of self-defense may be asserted,—

CRIMINAL LAW (Continued).

that he was not the first aggressor, or, if so, that he had endeavored to decline further struggle and that he had not sought the quarrel with the design of forcing a deadly issue, or inviting a real or apparent necessity for killing,—and so construed, the instruction is limited, pertinent and applicable. (Id.)

45. **MALICE AFORETHOUGHT—INFERENCE FROM CIRCUMSTANCES.**—An instruction that, “whether the defendant does or does not act with malice aforethought, is always to be inferred from the circumstances surrounding the case,” is not subject to just criticism by the defendant, whether it be considered as standing alone or as construed with other instructions fully dealing with the subject of malice aforethought. (Id.)
46. **IRRELEVANT TESTIMONY—HARMLESS RULING.**—The admission of irrelevant testimony having no bearing on the case on re-examination of a witness for the prosecution, where the same matter had been originally brought out on cross-examination of the witness by defendant’s counsel, is harmless. (Id.)
47. **CROSS-EXAMINATION—RE-EXAMINATION—EXPLANATION OF CONTRADICTIONARY STATEMENT—FALSITY.**—Where a witness for the prosecution is sought to be impeached on cross-examination by a contradictory statement made immediately after the homicide, which the witness admitted to have made, the witness is entitled on re-examination to explain that such contradictory statement was not true. (Id.)
48. **SILENCE OF WITNESS—EXPLANATION OF MOTIVE.**—Where the defendant, on cross-examination of a witness for the prosecution, who was a daughter of the deceased, showed that she did not say anything to her father or a doctor who was with him as to the presence of the defendant, she was properly permitted on re-examination to explain her motive for not informing them of the declared intention of defendant to kill her father, that the defendant was watching her with a gun in hand, and that she was afraid that he would kill both herself and her father. (Id.)
49. **DYING DECLARATION—RES GESTAE.**—Where the preliminary proof clearly showed that the dying declaration of the deceased was made in the full belief of impending death, it is not objectionable as stating a fact which was part of the res gestae, that when defendant approached the house the deceased was talking with the defendant’s brother about a horse-collar. (Id.)
50. **WEIGHT OF DEFENDANT’S BROTHER.**—It was not prejudicial error to permit the prosecution to ask the defendant’s brother, when a witness, as to his weight, where it was obvious to the jury that he was a large man and able physically to have intervened and stopped the killing of deceased, and where he had testified in effect that he did not intervene because he did not think there was going to be any trouble till it was all over. (Id.)

CRIMINAL LAW (Continued).

51. **STATEMENT OF DAUGHTER OF DECEASED—HEARSAY—FOUNDATION NOT LAID.**—It was not error to refuse to permit a witness for the defendant to testify to a statement made by the daughter who was a witness for the prosecution. If it was the same as she made while on the stand, it was inadmissible hearsay; and if different it could not be shown to impeach her testimony, where no foundation was laid on cross-examination for its admission; and where the court offered to allow the defense to recall the witness to lay a foundation, and the offer was rejected, the defense must abide by such rejection. (Id.)
52. **IMPOSITION OF DEATH PENALTY—PROVINCE OF JURY.**—Where the evidence on the part of the prosecution was such that if believed by the jury they were warranted in finding the defendant guilty of murder in the first degree, it was in the province of the jury to impose the death penalty, and this court cannot interfere with the exercise of their judgment. (Id.)
53. **TAKING AWAY OF FEMALE MINOR FOR PROSTITUTION—VENUE OF OFFENSE.**—If the original taking away of a female minor from the custody of her father in another county than that of the place of trial was with the intent then and there existing to place her in a house of prostitution in the county of the place of trial, the offense was committed and was triable alone in such other county; but where it appears that the female minor was placed by the father in the custody of the defendant, to be taken to the county of the place of trial for a lawful purpose, and that the defendant there formed the unlawful purpose of placing her in a house of prostitution therein, which purpose was accomplished, the taking of her away from the father without his consent for that purpose was in the county of the place of trial, within the meaning of section 267 of the Penal Code, and that county has jurisdiction of the offense. (People v. Lewis, 543.)
54. **ELEMENTS OF OFFENSE—ABDUCTION—REFUSAL OF INSTRUCTION.**—The actual placing of the minor female in a house of prostitution is not made an essential element of the crime by the statute. It is the taking away from the parent or other person having the legal charge of the minor for the prohibited purpose that constitutes the crime; "abduction" alone does not import the offense; and a requested instruction, to the effect that if "the defendant abducted the girl from her home," the jury must find the defendant not guilty of the offense charged, was properly refused. (Id.)
55. **RAPE—INSTRUCTION—COMPLAINT OF WRONG—RULE OF EVIDENCE.**—Where the defendant was accused of rape, and the testimony was uncontradicted that the prosecutrix made prompt complaint, it was proper to instruct the jury that "upon the trial of a defendant accused of the crime of rape, the fact that the prosecutrix made prompt and early complaint of the wrong and injury done to her person and to her character and chastity, is independent and original

CRIMINAL LAW (Continued).

evidence, and is admissible, and may be received and considered by the jury in corroboration of her other testimony given in the case." Such instruction merely states a well-recognized rule of evidence, applicable generally in such cases, and does not inform the jury of the facts or testimony in the case, and is not objectionable as singling out the testimony of a particular witness for comment. (*People v. Keith*, 686.)

56. **INSTRUCTION AS TO PROVINCE OF JURY—CONVICTION UPON TESTIMONY OF PROSECUTRIX.**—An instruction to the effect that it is the province of the jury to determine the weight and credibility to be given the testimony of the prosecutrix "as of any other witness testifying in the case," and that "if such testimony creates in the mind of the jury a satisfactory conviction and belief beyond a reasonable doubt of the defendant's guilt, it is sufficient of itself, without other corroborating circumstances or evidence, to justify a verdict of guilty," is not objectionable, either as omitting to refer to a complaint of the prosecutrix, or as telling the jury that if they believe the prosecutrix they should convict. (*Id.*)
57. **REFUSAL TO INSTRUCT AS TO LESSER OFFENSES—INAPPLICABILITY TO EVIDENCE.**—Where the evidence admitted of no doubt of the fact of sexual intercourse, which, if without consent, was rape, or, if with consent, included no offense within the crime charged, a requested instruction that the jury might find the defendant guilty of less offenses specified, was properly refused as inapplicable to the evidence. (*Id.*)
58. **REASONS FOR REFUSAL OF INSTRUCTIONS.**—It is not material what reasons were assigned by the judge for the refusal of requested instructions, if they were properly refused for any reason. (*Id.*)
59. **INSTRUCTION SINGLING OUT TESTIMONY OF WITNESS.**—It is not error to refuse an instruction which singles out the testimony of a particular witness for comment. (*Id.*)
60. **REQUESTS EMBODIED IN CHARGE.**—Requested instructions embodied in the charge of the court may be properly refused. (*Id.*)
61. **EVIDENCE—PHYSICAL CONDITION OF PROSECUTRIX—TREATMENT.**—Where the prosecuting witness testified to a prompt complaint to her mother, the admission of further evidence by her relative to her physical condition at that time, and to treatment by her mother to relieve that condition, was not objectionable as telling about the facts of the complaint. (*Id.*)
62. **REMARKS OF COURT—CAUTION AGAINST ERROR.**—Where the court in sustaining an objection made by the defendant, remarked, "I don't propose to have this case go up there, and be reversed again, if I can help it," the reasonable inference from the remarks is, that the court only desired to be right in his ruling and to avoid error or mistake therein, and though unnecessary, there is no prejudicial error in the remarks. (*Id.*)

CRIMINAL LAW (Continued).

63. **ROBBERY—DESCRIPTION OF PROPERTY IN INFORMATION—IMMATERIAL AVERTMENT OF VALUE.**—In an information for robbery, committed in the felonious taking of personal property from the person or immediate presence of the prosecuting witness, accomplished by means of force or fear, an averment of value of the property taken is immaterial, and may be disregarded. Where the property taken is described as "one purse containing twenty-eight dollars and sixty-two cents, in lawful money of the United States of America, of the value of twenty-eight dollars and sixty-two cents," the information charges the taking both of the money and of the purse, and is sufficiently certain as against a motion in arrest of judgment. (*People v. Stevens*, 488.)
64. **PROOF OF ROBBERY—LARCENY.**—Where the evidence showed that the prosecuting witness slept with defendant, after hanging his pantaloons containing the money in question on the headboard of the bed, and awoke to find the defendant standing over him, with the pantaloons in one hand and a razor in the other; that the prosecuting witness then seized the pantaloons from the defendant and jumped toward the door, to which defendant ran and stood against, and threatened him with the razor, unless he delivered up his "stuff"; that the prosecuting witness then, through fear, threw the pantaloons on the bed, and while defendant was engaged in rifling them unlocked the door and escaped,—the facts show a case of robbery, though the original taking of the pantaloons may have been a larceny. (*Id.*)
65. **PROOF OF INTRINSIC VALUE—GOLD MONEY—JUDICIAL NOTICE.**—Where it appeared that a twenty-dollar gold piece was part of the money taken, the court will take judicial notice that it had intrinsic value, without further evidence. It was not necessary to show that the purse was of intrinsic value. (*Id.*)
66. **IMMATERIAL INSTRUCTIONS AS TO LARCENY.**—Where the evidence was such that if the defendant was not convicted of robbery, he could not be convicted at all; and where the information was directed solely at the final act of forcible robbery, and not against the act of taking down the pantaloons from the headboard, instructions on the subject of larceny were immaterial; and the defendant having been convicted of robbery, it is immaterial whether larceny was correctly defined in any instruction given. (*Id.*)
67. **IMPROPER REQUESTS—NATURE OF ROBBERY.**—Requested instructions as to robbery, each of which ignored the forcible taking of property from the "immediate presence" of the owner by force or fear, were properly refused. (*Id.*)
68. **REQUEST AGAINST EVIDENCE.**—A requested instruction based upon the assumption, without evidence, and against the evidence to the contrary, that the money was taken from the pantaloons while the owner slept, was properly refused. (*Id.*)

CRIMINAL LAW (Continued).

69. **INSTRUCTION—DISTRUST OF FALSE WITNESS.**—An instruction to the jury that "if any witness examined before you has willfully sworn falsely as to any material matter, it is your duty to distrust the entire evidence of such witness," was proper, and in substantial accord with the statute. (Id.)

DAMAGES. See Contract, 1, 5; Eminent Domain, 6; Gas Companies; Instructions, 1; Insurance, 1; Irrigation District, 2, 3; Landlord and Tenant, 2, 3; Negligence, 4; New Trial, 8; Pleading, 4; Water and Water Rights, 22.

DEBTOR AND CREDITOR. See Building and Loan Associations; Fraud, 4; Mechanics' Liens.

DEDICATION. See Highway, 3; Municipal Corporations, 4.

DEED. See Estates of Deceased Persons, 26, 27; Findings, 5, 6; Fraud; Grant; Mortgage, 4-10, 21-25; Trusts, 1-4, 12, 16; Vendor and Vendee.

DEMAND. See Claim and Delivery, 4.

EJECTMENT. See Lease, 1.

ELECTIONS.

1. **DELAY IN OPENING POLLS—PRECINCT VOTE NOT INVALIDATED.**—A precinct vote is not invalidated entirely merely because of delay in opening the polls, where the officers acted without fraudulent intent, and only one voter appears to have failed of voting by reason of the delay, whose vote could not have changed the result of the election. (Kenworthy v. Mast, 268.)
2. **TEST APPLIED TO DEPARTURES FROM LAW.**—The true test to be applied to departures from the requirements of the laws regulating the conduct of elections on the proper day and at the proper place, whether the requirements are mandatory or directory, is as to whether or not the particular departure is of such a nature as to make it impossible or extremely difficult to determine, under the circumstances of the case, whether fraud has been committed or anything done which would affect the result. (Id.)
3. **PRESUMPTION AS TO POPULATION.**—There is no presumption that a township had a population entitling it to two justices of the peace, and where the pleadings of both parties justify it, it will be presumed after judgment that the township by reason of its population was entitled to one justice of the peace. (Id.)
4. **DECISION UPON APPEAL—FINDING AGAINST EVIDENCE—NEW TRIAL.**—Where a finding of the superior court as to malconduct of the

ELECTIONS (Continued).

- election board was not sustained by the evidence as to one precinct, which was decisive of the election, this court cannot order final judgment, but will order a new trial, in which the court will determine the case in accordance with the views expressed by this court. (Id.)
5. **CONTEST FOR PUBLIC OFFICE—POWER OF LEGISLATURE.**—Although the public is interested in the legality of elections, and in seeing that offices be filled by eligible citizens properly chosen, yet it is competent for the legislature to authorize any elector to take the proper steps to determine these questions, and the fact that the contesting elector has a personal interest in the result, as claiming the right to the office for himself, cannot affect the validity of the law. (*Maddux v. Walthall*, 412.)
6. **TRIAL BY JURY—WAIVER.**—Without deciding whether trial by jury is proper in an election contest, any right to such trial is waived where no demand therefor was made until after the trial was commenced. (Id.)
7. **MARKED BALLOTS—STAMP AFTER WORDS “NO NOMINATION.”**—Ballots stamped after the words “No nomination” are illegal and void, as having a distinguishing mark. The number of ballots so marked cannot affect their invalidity; and evidence is not admissible to show that by reason of the number of ballots so marked it ceased to be a distinguishing mark. (Id.)
8. **VIOLATION OF PURITY OF ELECTION LAW BY CONTESTANT—INSUFFICIENT DEFENSE.**—The court did not err in refusing to allow the contestee to urge in defense that the contestant had violated the Purity of Election Law. That question is to be determined in a separate proceeding for the infliction of the penalties provided therefor. (Id.)
9. **ELECTION OF CONSTABLES—COUNTY GOVERNMENT ACT—CONSTITUTIONAL LAW.**—The County Government Act of 1901, providing that “in townships having a population of less than six thousand there shall be but one justice of the peace and one constable,” is constitutional. The amended sections of the act were republished as amended, and this was a compliance with section 24 of article IV of the constitution; and the act is general and uniform in its provisions, under section 5 of article II of the constitution. (*Sanchez v. For-dyce*, 427.)
10. **VALIDITY OF ELECTION—IMPROPER PROCLAMATION—IMPROPER BALLOTS.**—The election for one constable is valid in a township of less than six thousand, notwithstanding the proclamation of the board of supervisors improperly called for the election of two constables. The statute gave notice of the time and place of the election; and notwithstanding only a small portion of the voters voted for only one constable, the court properly rejected all ballots containing the names of two constables in such township. (Id.)

ELECTIONS (Continued).

11. **ELECTION CONTEST—DECLARATION OF ELECTION—FAILURE TO QUALIFY.**—No other right is involved in a contest of "the right of a person declared elected to any office" than the apparent legal right which is created by the declaration of the canvassing board that such person has been elected. The contest attacks the election itself, and is not concerned with the certificate of election or the proceedings subsequent thereto; and the jurisdiction of the court to entertain, or the right of the elector to commence, the contest, is not in any manner affected by the failure of the person declared elected to qualify before the contest was begun. (*Sweeny v. Adams*, 558.)
12. **INTEREST OF PUBLIC.**—The contest does not merely concern the personal and pecuniary interest of rival candidates for the office; but paramount to their claims is the deep public concern involved as to who are entitled to hold an office for which the suffrages of the electors have been cast. The public interests imperatively require that the ultimate determination of the contest should in every instance, if possible, reach the very right of the case, and ascertain and declare whether either of the rival candidates before the court or some other candidate has been elected. (*Id.*)

EMINENT DOMAIN.

1. **ACTION TO CONDEMN LAND—PLAINTIFF NOT BOUND TO TAKE.**—A plaintiff, by bringing an action to condemn land for a public use, does not bind himself to take the land and pay the compensation fixed by the court or jury. (*Pool v. Butler*, 46.)
2. **UNACCEPTED DEPOSIT—TENDER—APPEAL FROM DECREE—ABANDONMENT OF ENTERPRISE—WITHDRAWAL OF DEPOSIT.**—Where a deposit of the compensation fixed was made with the clerk but was not accepted, it amounted to no more than a tender; and where the defendants by motion for a new trial and appeal sought to reverse the entire decree, and thereby effected a long delay, the plaintiffs had the right, before the defendants were willing to accept the deposit, or were in a position to demand it, after affirmance of the judgment upon appeal, to abandon the enterprise and withdraw the deposit except as to costs. (*Id.*)
3. **NOTICE PENDING APPEAL—DISMISSAL OF ACTION—ORDER AFTER AFFIRMANCE.**—Where the defendants were notified before the judgment became final by affirmance upon appeal, that the plaintiffs would not take the property, and would move immediately upon the filing of the *remittitur* to vacate the judgment and dismiss the action, an order dismissing the action pursuant to such notice and motion will be affirmed upon appeal therefrom. (*Id.*)
4. **ACTION TO CONDEMN LAND—DISMISSAL BY PLAINTIFF—STIPULATION—CONDITIONS RENDERED IMPOSSIBLE.**—The right of the plaintiff in an action to condemn real property to dismiss it before trial, upon payment of costs, where no counterclaim had been made nor affirma-

EMINENT DOMAIN (Continued).

tive relief sought by cross-complaint or answer, is not precluded by a stipulation for judgment for the plaintiff at a fixed price, containing conditions for its effectiveness which have never occurred and cannot occur. (*Southern California Mountain Water Company v. Cameron*, 283.)

5. **OPENING OF PUBLIC STREET—STIPULATION—INJUNCTION SUIT—DELAY OF TRIAL—LOSS OF EQUITABLE RELIEF.**—Where by stipulation entered into at the trial of an action to condemn land the condemnation had become final, it being also stipulated that an ordinance should be passed to vacate an alley as a street or thoroughfare, and an injunction was sought to restrain the opening of the street over plaintiff's land until a valid ordinance should be passed as stipulated, but no injunction was enforced, and for seven or eight years before the trial of the suit the street had remained open and occupied as a public street, and plaintiff paid assessments on her property for its improvement, the plaintiff was not entitled upon the delayed trial of the injunction suit to the equitable relief sought. (*Bigelow v. City of Los Angeles*, 503.)
6. **DAMAGES—ABSENCE OF ISSUE—PLEADING—CLAIM NOT PRESENTED TO COUNCIL—NEW TRIAL.**—Where no issue was raised on the trial upon the question of damages, and the plaintiff merely sought to sustain her prayer for an injunction by an averment that she would be damaged in the sum of ten thousand dollars by failure to vacate the street, as stipulated, or to sustain the injunction sought, and where no claim for damages was presented to the city council, as required by the city charter, a new trial cannot be granted to try the question of damages. (*Id.*)

ESTATES OF DECEASED PERSONS.

1. **RIGHT OF ADMINISTRATION—ADVERSE CLAIM TO PROPERTY.**—An adverse claim to property claimed by the estate of a deceased person is not a statutory disqualification of a resident son of the deceased otherwise competent to act as administrator of the estate with the will annexed, and such son is entitled to administer upon such estate as against the nominee of a non-resident executor and of non-resident children, heirs, and legatees of the deceased person. (*Estate of Brundage*, 538.)
2. **POWER OF COURT—DISCRETION.**—The court has no power to add to the statutory disqualifications of an administrator, and has no discretionary power to refuse letters of administration to one who has the statutory right thereto, or to appoint the nominee of persons not entitled to the letters applied for, as against the one entitled thereto. (*Id.*)
3. **PROBATE OF FOREIGN WILL—AUTHENTICATED COPY—RIGHT OF FOREIGN EXECUTOR—POWER OF NOMINATION.**—Where the foreign will of a deceased person was admitted to probate in another state, and

ESTATES OF DECEASED PERSONS (Continued).

an authenticated copy thereof was admitted to probate in this state, the foreign executor, if he applies therefor, is entitled to letters testamentary in this state as against a resident son of the deceased testator, but if he makes no such application, he has no power or right to nominate an administrator with the will annexed, and the resident son has the better right to letters of such administration as against such nominee. (Id.)

4. **RIGHTS OF ASSIGNEE OF DEVISEE.**—Though the assignee of a daughter of the deceased person, who is a devisee, is entitled to letters as against the public administrator, he is not entitled thereto as against a son of the deceased testator, who is also a legatee named in the will, and in other respects competent to administer. (Id.)
5. **RIGHTS OF SON AGAINST DAUGHTER.**—A son and daughter of a deceased person are not equally entitled to letters of administration, and the court has no discretion to do otherwise than appoint the son. (Id.)
6. **FINAL ACCOUNT—CONTEST—BURDEN OF PROOF.**—Upon a contest of the final account of an administratrix, where the exceptions taken to the account are affirmative, the burden of proof is upon the contestant; and the administratrix in opening her case upon the account was not required to anticipate the evidence in support of the exceptions, nor to show that the affirmative allegations therein contained were not true; and the court properly refused to disallow the account for want of proof of the falsity of such allegations. (Estate of Vance, 624.)
7. **FRAUDULENT TRANSFER BY DECEDENT TO ADMINISTRATRIX PERSONALLY—ATTACK BY CREDITOR OF ESTATE—PLEADING.**—Without deciding whether the right of an administratrix who received a gift from the decedent as his daughter can be assailed by one who claims to be a defrauded creditor of the estate of the decedent, upon the settlement of the final account of the administratrix, or whether it is the subject of an independent suit, it cannot be set aside as a fraudulent transfer in any case, without an appropriate pleading, in which the fraudulent intent is alleged as matter of fact, as being material to the right claimed to set it aside. (Id.)
8. **CONSTRUCTION OF PROVISIO—VOLUNTARY GIFT BY INSOLVENT—RULE OF EVIDENCE.**—The proviso to section 3442 of the Civil Code, to the effect that any transfer made voluntarily, without a valuable consideration, while insolvent, is fraudulent and void as to existing creditors, is a rule of evidence, and not of pleading, and does not affect the rule that the fraudulent intent is a fact which must be alleged. (Id.)
9. **VALIDITY OF TRANSFER—LEGAL TITLE.**—The transfer was valid between the parties, and if in fraud of creditors could not be considered as void in law in the absolute sense. It was effectual to

ESTATES OF DECEASED PERSONS (Continued).

transfer the legal title until there was some appropriate action by some court having jurisdiction declaring it fraudulent and void. It was not legally the property of the decedent at the time of his death. (Id.)

10. **TRUST FOR CONTESTING ESTATE—ENFORCEMENT.**—The question whether the decedent at the time of the transfer to his daughter was holding the property in question in trust for the estate represented by the contestant, and whether the daughter is chargeable with the same trust, cannot be determined upon a contest of the final account of the daughter as administratrix of the estate of her deceased father, but can only be determined in a personal action against the daughter to enforce the trust. (Id.)
11. **APPEAL FROM ORDER OF SALE—GENERAL DEMURRER TO PETITION—WAIVER OF SPECIAL OBJECTIONS.**—Upon appeal from an order of sale of real property of a deceased person, taken by the surviving wife, who is also a devisee and legatee under the will of the decedent, the appellant occupies no more advantageous position, so far as the insufficiency of the petition is concerned, by having filed a general demurrer thereto, than if she had not presented such demurrer, the question being in either case whether the petition is substantially defective in any of the requirements of section 1537 of the Code of Civil Procedure. Where no ground of special demurrer or special objection was urged to the petition in the lower court, all special objections thereto which might have been successfully urged in the court below are to be deemed waived. (Estate of Levy, 639.)
12. **VALUES OF REALTY—REFERENCE TO SCHEDULE—APPRAISED VALUES.**—Where the petition for the order of sale refers to a schedule for the values and condition of the real estate, and the values there set forth are the appraised values thereof, this, in the absence of special objection, is a sufficient statement of the present values. (Id.)
13. **CONDITION OF REALTY—TENABLE SPECIAL OBJECTION—EVIDENCE.**—Where the only description of the condition of two city lots is, that each of the two parcels was improved, that one had been set apart as a homestead for the period of administration, and that the other was encumbered by a mortgage for ten thousand dollars, if timely special objection had been urged to the petition for insufficiency of such statement of condition, it should have been sustained. But, in the absence of such special objection, the statement of condition of the real property is not to be deemed fatally defective. It was sufficient to authorize the court to receive evidence of the condition of the lots, and to determine, in view of such evidence, whether it would authorize a sale. (Id.)
14. **OMISSION AS TO FAMILY ALLOWANCE—PURPOSE OF SALE—PRESUMPTION UPON APPEAL.**—The omission of the petition to state the

ESTATES OF DECEASED PERSONS (Continued).

amount due or to become due on the family allowance does not render the petition insufficient in the absence of special objection; and where the sale was not ordered to pay the family allowance, it will not be presumed upon appeal that anything was due or to become due thereon. (Id.)

15. **OMISSION TO NAME HEIRS AS SUCH.**—The omission of the petition to state that the persons named therein as devisees and legatees were also the only heirs of deceased, as appears from the order of sale, was not fatal to the order. (Id.)
16. **PETITION BY EXECUTORS—OFFICIAL CHARACTER.**—A petition by executors for an order of sale in the matter of the estate, presented to the court in which the estate was pending, and by which they were appointed, if appointed at all, is not objectionable upon the ground that it did not sufficiently show their official character. (Id.)
17. **ORDER SETTING APART HOMESTEAD—APPEAL—PARTIES AGGRIEVED.**—Both the executors under the will of a deceased testator and the devisees and legatees named in the will are parties aggrieved by an order setting apart a homestead for the widow for and during the administration of the estate and until its final distribution, and may appeal therefrom to this court. (Estate of Levy, 646.)
18. **EFFECT OF HOMESTEAD ORDER—DEVISEES ESPECIALLY AGGRIEVED.**—The effect of the homestead order is to remove the premises set apart from the disposition of the will and to vest title thereto, subject to the order, in the heirs of the deceased as distinguished from the devisees; and where the devisees will not as heirs receive as large shares of the property as they would have received as devisees, they are especially aggrieved by the order. (Id.)
19. **PROPERTY SUBJECT TO HOMESTEAD—FAMILY RESIDENCE—BUILDING COMPOSED OF FLATS.**—An entire building composed of three flats, having separate entrance-doors in front, and connected together by a stairway in the rear, the top one of which was occupied as a family residence by the deceased testator and his wife up to the time of his death, could have been legally selected as a homestead, together with the lot on which the building stands; and it may be properly set apart to the widow as a homestead by the probate court for a limited period, having a just regard to the rights of others interested in the estate. (Id.)
20. **USE OF BUILDING FOR OTHER PURPOSES.**—Where a portion of a building is actually used *bona fide* as a family residence, and not primarily as merely incidental to a business, it may be selected as a homestead, with the land on which it is situated, no matter how large a part thereof may be used for other purposes than for a family residence. (Id.)
21. **CONSTRUCTION OF HOMESTEAD LAW—REMEDIAL STATUTE.**—The homestead statute is a remedial measure and should be reasonably construed. (Id.)

ESTATES OF DECEASED PERSONS (Continued).

22. PROBATE HOMESTEAD—VALUE NOT LIMITED.—There is no specified limitation of value in the case of a probate homestead if the estate is not insolvent; and the court may set aside such property, regardless of its value, in view of the value and condition of the estate, as may seem just and proper. The fact that the premises set apart were valued at seventeen thousand five hundred dollars, and constituted in value one-half of the estate, does not impair the homestead right in the absence of a statutory limitation as to value. (Id.)
23. SUBORDINATE RIGHTS.—The rights of creditors, and of heirs, devisees, and legatees, though proper to be considered, are subordinate to the right of the family to a home; and, if it is necessary to take the entire estate for a homestead, such subordinate rights must yield. (Id.)
24. PETITION TO ENFORCE CONVEYANCE OF LAND—DISMISSAL—AMENDMENT NUNC PRO TUNC—COSTS—APPEAL.—Where a petition to enforce a contract for the conveyance of land of a deceased person was contested by the administrator, and was dismissed without prejudice, under section 1602 of the Code of Civil Procedure, and several months thereafter the administrator moved for and obtained an amendment to the judgment *nunc pro tunc*, taxing the costs against the petitioner, the petitioner is entitled to appeal from the judgment so amended within sixty days from the date of the amendment, upon a bill of exceptions prepared and served thereafter in due time. (Estate of Potter, 350.)
25. DECREE OF DISTRIBUTION—DISCHARGE OF ADMINISTRATRIX—TIME FOR APPEAL—DISMISSAL.—The time for an appeal from probate orders, judgments, and decrees is limited by section 1715 of the Code of Civil Procedure to sixty days from the date of entry. This court has no jurisdiction of appeals from a decree of distribution or from a decree of final discharge of an administratrix, taken more than sixty days after their entry; and such appeals will be dismissed. (Estate of Campbell, 72.)
26. DISTRIBUTION—JURISDICTION—CONVEYANCE BY HEIR-APPARENT.—The jurisdiction of the superior court over the estates of deceased persons is entirely statutory; and whatever power it may have in the matter of the distribution of an estate of a deceased person to consider and determine the rights of the grantees of heirs, legatees, or devisees, under conveyances made by them after the death of the decedent, rests solely upon the provisions of section 1678 of the Code of Civil Procedure, and is limited by the terms of said section. The court has no jurisdiction to determine the right of the grantee of an heir-apparent under a deed made prior to the death of the decedent, or to distribute the estate to such grantee, against the objection of the grantor, who is the sole heir of the decedent. (Estate of Ryder, 366.)

ESTATES OF DECEASED PERSONS (Continued).

- 27. VOID BARGAIN-AND-SALE DEED—SUBSEQUENTLY ACQUIRED TITLE.**—A bargain-and-sale deed by an heir-apparent prior to the death of the person of whose estate he may become the heir is legally void for want of any interest then to be conveyed, and the effect of the deed to convey the subsequently acquired title of the grantor cannot authorize the grantee to claim distribution of the estate against the objection of the heir. Distribution of the estate of the decedent must be made to the heir who insists thereupon, leaving the question of the effect of the deed upon the after-acquired title of the heir, under section 1106 of the Civil Code, to be asserted in a proper proceeding. The determination of questions relative thereto is not within the scope of the probate proceedings, and is not authorized by statute. (Id.)
- 28. CLAIM TREATED AS REJECTED—ALLOWANCE PENDING SUIT—JUDGMENT FOR COSTS.**—Where a claim upon a note of a deceased person was treated as rejected under the statute, and pending action thereon was approved and filed as an allowed claim, a judgment for costs is the full extent of relief to which plaintiff was thereafter entitled. A judgment upon the claim could have no greater effect than that of an approved claim. (Hall v. Cayot, 13.)
- 29. REJECTED NOTE—SECURITY—UNINDORSED STOCK—CERTIFICATE OF SECRETARY—EQUITABLE LIEN—ORDER OF SALE AGAINST EXECUTOR**—Where the note of a decedent was intended to be secured by his delivery to the payee of an unindorsed certificate of stock standing upon the books of a corporation in his name, which intention was evidenced by a certificate of the secretary of the corporation indorsed thereon, stating the object of the delivery, such delivery created an equitable lien upon the stock, which was good and enforceable as between the parties. In an action upon the rejected note and security against the decedent's executor, the plaintiff is entitled to enforce both the note and the security, and to have an order of sale of the stock as against the executor, who occupies the same position which the decedent would have occupied had he lived. (Id.)
- 30. PROCEEDING TO DETERMINE HEIRSHIP—COSTS—DEPOSITIONS NOT USED.**—In a proceeding to determine heirship of the estate of a deceased person, where the plaintiff and one of the defendants each claimed the entire estate as against all other claimants, as sole child and heir, and the judgment was in favor of the other defendants, who were devisees and legatees under the will of the decedent, a judgment in their favor for costs was proper, and such judgment might properly include the costs of depositions taken by them, though not used at the trial, in the absence of a showing that it was unnecessary to take them, or that they should not be allowed for some special reason. (Lindy v. McChesney, 351.)
- 31. DISCRETION OF COURT—APPORTIONMENT OF COSTS.**—The court has discretion in a proceeding to determine heirship, under section 1664

ESTATES OF DECEASED PERSONS (Continued).

of the Code of Civil Procedure, to apportion the costs between the parties; but it is proper to award costs to the successful claimants, as against an unsuccessful adverse claimant of the whole estate. (Id.)

32. **PROCEEDING TO DETERMINE HEIRSHIP—SECOND TRIAL—CONTINUANCE—DISCRETION.**—Upon the second trial of a proceeding to determine heirship, where the cause was long pending, and a previous continuance had been granted to the appellant for several months, and he had had ample opportunity to prepare for trial, and the cause was set for trial, without objection, by a jury demanded by the appellant, a motion for continuance by him thereafter was addressed to the discretion of the court, and it was not an abuse of discretion to refuse it and to proceed to a trial of the proceeding. (Estate of Kasson, 33.)

33. **DISQUALIFICATION OF JUDGE—BIAS AND PREJUDICE—CONFLICTING AFFIDAVITS—MOTION PROPERLY DENIED.**—Where the disqualification of the judge to try the proceeding was objected to by the appellant for alleged bias and prejudice, but upon the showing made by the affidavits and counter-affidavits it did not appear that the judge could not fairly and impartially try the cause, the motion to disqualify him for bias and prejudice was properly denied. (Id.)

34. **NATURE OF PROCEEDING—EACH PARTY AN ACTOR AS AGAINST ADVERSE PARTIES—FAILURE TO APPEAR AT TRIAL—NONSUIT.**—In a proceeding to determine heirship each party is an independent actor and is a plaintiff as against all other parties whose claims are adverse, though styled a defendant; and where the appellant who claimed the entire estate as against the other parties to the proceeding failed to appear at trial, after refusal of her motion for continuance, and offered no evidence in support of her claim, a nonsuit was properly granted against her, and her claim was properly eliminated from the trial. (Id.)

35. **ERROR NOT EXCEPTED TO.**—If there were any error in granting the nonsuit, it would be error occurring at the trial, which could not be considered upon appeal where no exception was taken thereto at the time. (Id.)

36. **MOTION FOR NEW TRIAL—DISQUALIFICATION OF JUDGE AS ATTORNEY—AFFIDAVITS FILED TOO LATE—COUNTER-SHOWING.**—Where the disqualification of the judge to hear the appellant's motion for a new trial was objected to, on the additional ground that he had acted as an attorney for a special administrator in the matter of the estate, but the affidavits in support thereof were filed late to be considered, and it appeared by counter-affidavits that the judge was not disqualified as alleged, the motion to disqualify him was properly refused. (Id.)

See Adoption, 1; Broker, 1, 6; Costs, 1; Newspaper; Willa.

ESTOPPEL.

PLEA OF ESTOPPEL—WAIVER OF OBJECTION—APPEAL.—Where there was an attempt in the answer to plead facts constituting an estoppel, and evidence was received under it without objection to the pleadings, and the case was tried on the theory that the plea was sufficiently made, objection to the pleading was waived and cannot be urged upon appeal for the first time. (*Wiley v. Crocker-Woolworth National Bank*, 508.)

See Adoption, 5; Appeal, 13; Claim and Delivery, 6; Corporations, 2; Highway, 4; Mortgage, 3; Partnership, 3; Street Assessments; Trusts, 10; Water and Water Rights, 20.

EVIDENCE.

MEDICAL EXPERTS—EXTRACTS FROM BOOKS INADMISSIBLE.—A medical expert cannot, on direct examination, recite instances from medical reports and authors illustrating the difficulties attending the diagnosis of a case similar to the one involved in the trial. Medical works are hearsay and inadmissible in evidence, except on cross-examination, when a specific work may be referred to, to discredit a witness who has based his testimony upon it. (*Baily v. Kreutzmann*, 519.)

See Agency, 1, 3, 4; Appeal, 7; Bill of Particulars; Broker, 3, 6; Claim and Delivery, 5; Contract, 1-4; Criminal Law, 6-8, 10-12, 16, 19-22, 25, 27, 31-36, 47-52, 56, 61, 64-66; Findings; Fraud, 2, 5; Guaranty; Landlord and Tenant, 6; Lease, 1, 2, 6, 7; Malicious Prosecution, 2, 3, 5-7; Mines and Mining, 2-5; New Trial, 15, 17, 20; Nuisance, 2; Railroads, 1; Trusts, 7, 11; Unlawful Detainer, 1, 4, 6.

EXECUTION. See Justice's Court, 4; Mechanics' Liens, 10.

EXECUTORS AND ADMINISTRATORS. See Estates of Deceased Persons.

FENCES. See Landlord and Tenant, 7.

FINDINGS.

1. **APPEAL—REVIEW OF EVIDENCE—SUFFICIENCY OF SPECIFICATIONS—SURPLUSAGE.**—A specification of insufficiency of the evidence to sustain a finding, which refers to the finding with sufficient clearness, is not vitiated by reference to a wrong number, and to language of the complaint not found in the finding. Such number and incorrect language may be disregarded as surplusage. (*Craig v. Crafton Water Co.*, 178.)
2. **FINDING UPON SEVERAL POINTS—UNDISPUTED MATTER—RESPONDENT NOT MISLED.**—The fact that the finding assailed contained several propositions, but the only disputed matter related to a single propo-

FINDINGS (Continued).

sition, will not vitiate the specification where the respondent was not misled in the preparation of the statement which contains all the evidence. (Id.)

3. **ABSENCE OF BILL OF EXCEPTIONS—PRESUMPTION UPON APPEAL.**—Where the facts found are sufficient to sustain the judgment, and are within the issue, in the absence of any bill of exceptions, it must be presumed upon appeal that the evidence presented in support of the findings was competent to establish the facts alleged, and was received at the trial without any objection, and was sufficient to sustain each of the facts found. (*Cutting Fruit Packing Co. v. Canty*, 692.)
4. **COUNTERCLAIM—REDUCTION OF PLAINTIFF'S CLAIM—OMISSION IN FINDING—PRESUMPTION—BURDEN UPON APPELLANT.**—Where the court found that the defendant was entitled, by way of offset to the claim of the plaintiff, to a specified sum for other peaches sold and delivered to the plaintiff, being the peaches referred to in the counterclaim, and deducted such sum from plaintiff's damages, the omission of the court to make a specific finding as to a larger sum claimed in the counterclaim is not ground of reversal, where the record does not show that defendant offered any evidence in support of such larger sum. Error is not to be presumed; and it was incumbent on the appellant to cause the record to show that he was entitled under the evidence to the larger sum. (Id.)
5. **FINDINGS AGAINST EVIDENCE—TITLE OF ASSIGNEE IN INSOLVENCY—DECLARATION OF HOMESTEAD—LIMITED DESCRIPTION.**—Where the appellant claimed title to the disputed premises under conveyance from an assignee in insolvency of the respondent's husband, and a declaration of homestead under which the respondents, husband and wife, claim, did not describe the disputed premises, though the husband in fact owned and resided upon the same, as part of his inclosure, the disputed premises were not exempt as a homestead from the claims of creditors, and findings that the respondents are entitled to the disputed premises, and that plaintiff is not entitled thereto, are against the evidence. (*Harris v. Duarte*, 497.)
6. **DEED BY ASSIGNEE IN INSOLVENCY—PROOF OF PROCEEDINGS NOT REQUIRED.**—A party claiming title under a deed by an assignee in insolvency is not required in support of his deed to offer proof that the assignee made full report of his proceedings under the order of sale, and that the insolvency court made an order confirming the sale. (Id.)

See Appeal, 7, 8, 11; Elections, 4; Irrigation District, 1, 3; Mines and Mining, 3, 5; Mortgage, 10, 14; New Trial, 16-18; Pleading, 5.

FORFEITURE. See Insurance, 2-4; Lease, 4; Mines and Mining, 2, 3.

FRANCHISE. See Taxation.

FRAUD.

1. **ACTION BY HEIR TO SET ASIDE DEED—FRAUD AND UNDUE INFLUENCE UPON HABITUAL DRUNKARD.**—An action may be maintained by the sole heir of a deceased person to set aside a deed procured from the deceased without consideration by the fraudulent practices of the defendants and their undue influence over the deceased, who was known to be an habitual drunkard for more than five years before the execution of the deed, to an extent seriously to impair his mind, and who was so intoxicated at the time as to render him unfit to transact business, and entirely incapable of realizing, understanding, or attending to the transaction. (*Donnelly v. Rees*, 56.)
2. **EVIDENCE—DECLARATION OF GRANTOR—SILENCE OF DEFENDANTS.**—In such action a declaration of the grantor made in an affidavit in an attachment suit brought by his creditor, to the effect that the deed was not a sham, or without consideration, or in fraud of creditors, was admissible, but not conclusive on the court; and where the affidavit was made in the presence of the defendants, and alluded to "a contemporaneous writing executed" by them, of which they say nothing in their testimony, their silence is a significant circumstance against them. (*Id.*)
3. **INVOLUNTARY TRUST—CONSTRUCTION OF CODE.**—Where it appears that the defendants gained the land by actual fraud, and also by undue influence, and by the violation of an assumed trust, they are, under section 2224 of the Civil Code, involuntary trustees of the thing gained as against the heirs of the deceased grantor. (*Id.*)
4. **FRAUD UPON CREDITORS—GENERAL RULE INAPPLICABLE.**—The general rule that a court of equity will not grant relief to one who has made a deed to defraud creditors has no application where the deed was procured by fraud or undue influence of the defendants, who will not be allowed to perpetrate a greater fraud, and to take advantage of their own wrong and of the absence of free consent of the grantor, and who, under express statutory provision, take as trustees of the grantor. (*Id.*)
5. **EVIDENCE—HABITS AND CONDITION OF GRANTOR.**—The objection that evidence was allowed as to the drunken habits and condition of the grantor, at periods from seventeen to twelve years prior to the date of the transaction, goes rather to the weight than to the admissibility of the testimony. (*Id.*)
6. **ACTION TO ENFORCE TRUST—RESCISSION NOT INVOLVED.**—In an action to enforce an involuntary trust in favor of an heir of the deceased grantor, the objection that the grantor did not rescind promptly is untenable. (*Id.*)
7. **CHARGES NOT CONNECTED WITH TRANSACTIONS—PAYMENTS NOT REQUIRED.**—The plaintiff was not required to make any payments on account of an alleged bill against the grantor, or for moneys alleged to have been advanced to him subsequently to the alleged transac-

FRAUD (Continued).

tion, where these matters cannot be regarded as connected with the transaction. (Id.)

See Agency, 3; Estates of Deceased Persons, 7-10; Street Assessment, 2; Trusts, 1; Unlawful Detainer, 3.

GAS COMPANIES.

ACTION UPON PENAL STATUTE—LIQUIDATED DAMAGES—DEBT FOR GAS UNEXTINGUISHED—REFUSAL OF TENDER.—An action under section 629 of the Civil Code, to recover from a gas company liquidated damages for failure to supply the plaintiff with gas, is based upon a penal statute, and plaintiff must show a strict compliance with its terms, by payment of all money due the gas company, or, if it refuses to receive it, by extinguishment of the debt by deposit of the money to the credit of the gas company, and notice thereof, as provided in section 1500 of the Civil Code. The action cannot be sustained by mere proof of the tender of the money and refusal of the defendant to receive it, without such extinguishment of the debt. (*Baker v. San Francisco Gas and Electric Company*, 710.) See Contract, 6-11.

GIFT. See Estates of Deceased Persons, 7-10; Trusts, 5.

GRANT.

1. **ESTATE FOR LIFE OF GRANTOR—CONSTRUCTION OF CONTRACT—LEASE.**—A contract between a mother and her son, by which, in consideration of past care and attention, and on condition that the son shall supply her with necessities and give her such care as her age and condition may require, "so far as he is able to do so," she granted to him all of her personal property, and also all of her interest in a homestead entry, with the right to cultivate or rent the same during her life, and to prove up as sole heir to the land after her death, is not a lease, for want of a certain rent, and for want of validity as a lease of agricultural land, but is to be construed as making to the son a grant of a freehold estate for the life of the mother. (*Mann v. Mann*, 326.)
2. **GRANT IN FEE BY TENANT FOR LIFE—TERMINATION OF LIFE ESTATE—GRANT BY PATENTEE—ADVERSE POSSESSION—PRESCRIPTIVE TITLE.**—Where the tenant for life, claiming to be the absolute owner of the homestead under the contract, granted an estate in fee to one of the plaintiffs, under whom the other plaintiff claims, the possession of the grantee of such estate, after the termination of the life estate, by the death of the mother, became adverse to the grantee of the mother, who had herself obtained a patent for the homestead and granted it to the testator of the defendants, and where such adverse possession was accompanied by the payment of all taxes upon the lands and was continuously hostile for the statutory period, it ripened into a prescriptive title, which the law will protect as against the defendants. (Id.)

GROWING CROP. See Landlord and Tenant, 1.

GUARANTY.

1. **GUARANTY TO BANK—DRAFT FOR ORANGES—“BILLS OF LADING ATTACHED”**—EVIDENCE OF FACTS AND CIRCUMSTANCES—QUESTION FOR JURY.—A guaranty to a bank of ninety per cent of the face value of all drafts for oranges “with bills of lading attached,” drawn by a fruit company in favor of the bank during a specified orange season, is not sufficiently clear and obvious as to the meaning of the phrase “with bills of lading attached” to justify the court in a construction of it as matter of law, and in refusing to permit the jury, under the evidence disclosing the facts and circumstances surrounding its execution, to determine what the parties intended by those words, the meaning of which was disputed. Such determination was the province of the jury, and not of the court. (*First National Bank of Redlands v. Bowers*, 253.)
2. **CONSTRUCTION OF GUARANTIES—EXPLANATION—INTENTION OF PARTIES.**—Contracts of guaranty, like all other contracts, should receive a fair and liberal interpretation, according to the true import of their language, and may be explained by reference to the circumstances under which they were made and the matter to which they relate, the main object being to ascertain and effectuate the intention of the parties. (*Id.*)

See Surety.

GUARDIAN AND WARD.

CUSTODY OF MINOR—VOLUNTARY DEPARTURE FROM STATE—HEARING ON HABEAS CORPUS—GOOD FAITH OF RESPONDENTS.—Where the return to a writ of *habeas corpus* sued out by a father to obtain the custody of his minor son showed that he had of his own volition departed for Honolulu, and there remained with his sister, and where upon the hearing it appeared that the minor was a son fifteen years of age and in size a man, and that he had quarreled with his father, and had determined never to return to him, and that respondents did not encourage him to go to Honolulu, but merely from motives of humanity furnished him with funds for the trip which he determined to take, and that this was not done to evade the writ or to deprive the father of his custody or for any ulterior or sinister motive or purpose, and that the child is not in their control, the writ of *habeas corpus* must be discharged. (*In re Christal*, 523.)

HABEAS CORPUS. See Guardian and Ward.

HIGHWAY.

1. **PUBLIC HIGHWAY—OBSTRUCTION—INJUNCTION.**—Where it appears that a road claimed by the defendants as a private road was laid out or designated by the parties through or across whose land it ran

HIGHWAY (Continued).

first, and has since been used by all persons who had occasion to pass that way, and became dedicated or abandoned to the public prior to the placing of an obstruction thereon by the defendants, this constituted it a highway, or public road, within the terms of the statute as well as at common law, and the defendants were properly enjoined from obstructing or interfering therewith, to the injury of the plaintiff. (*Hartley v. Vermillion*, 339.)

2. **"PRIVATE" AND "PUBLIC" ROADS—POWER OF LEGISLATURE—CLASSIFICATION OF HIGHWAYS.**—The legislature has no power to lay out "private" roads so as to make them the property of individuals or private ways at common law; but a road laid out as a "private road" becomes a public way, over which all may lawfully pass who have occasion. The distinction between "public" and "private" roads is one merely of classification of highways. (*Id.*)
3. **PRESCRIPTIVE USE OF ROAD—IMPLIED DEDICATION.**—Where, as in this case, the public, or such portion of the public as had occasion to use the road, traveled over the same without asking or receiving any permission, and without objection from any one, for the period of time beyond that required by law to bar a right of action, a right in the public to the use of the road arises by prescription or implied dedication. (*Id.*)
4. **ESTOPPEL OF DEFENDANT.**—Where one of the defendants sold to the plaintiff a strip of land along his north line for the purpose of a right of way from the plaintiff's premises to the road in question, as a means of reaching a public highway, such defendant is estopped from denying as against the plaintiff that there was a dedication of the road in question. (*Id.*)

HOMESTEAD. See *Estates of Deceased Persons*, 17-23; *Findings*, 5; *Trusts*, 6.

HOSPITAL. See *Office and Officers*, 10-12.

HUSBAND AND WIFE. See *Mortgage*, 2, 3; *Trusts*, 5, 6.

INCEST. See *Criminal Law*, 9-14.

INDEMNITY. See *Landlord and Tenant*, 4-6.

INFANTS. See *Guardian and Ward*.

INJUNCTION. See *Building and Loan Associations*, 3; *Contract*, 10 11; *Eminent Domain*, 5, 6; *Highways*, 1; *Irrigation District*, 3; *Mechanics' Liens*; *Municipal Corporations*, 4, 5; *Nuisance*; *Trusts*, 12; *Water and Water Rights*, 4.

INSANITY. See *Criminal Law*, 21, 22.

INSOLVENCY. See Findings, 6; Statute of Limitations.

INSTRUCTIONS.

1. **REFUSAL OF REQUESTED INSTRUCTIONS—INSUFFICIENT ARGUMENT.**—A statement in the brief of appellant that "The instructions of defendant which the court refused to give were proper and necessary to guide the jury in its verdict," and that "The instructions Nos. 13, 14, 15, and 16 should have been given," is insufficient, in not pointing out the error in refusing each particular instruction, and the reasons why it should have been given. This court will not examine the offered instructions, and go through the record to see whether or not any of them was necessary to guide the jury in its verdict. (*Arnold v. Producers' Fruit Co.*, 738.)
2. **REQUESTED INSTRUCTION—INCORRECT RULE FOR DAMAGES.**—A requested instruction for the defendant, stating rules for estimating damages which were neither pertinent nor correct, was properly refused. (*Silver v. Bair*, 599.)
3. **SALE—COUNTERCLAIM.**—Where the defendant set up two counterclaims against plaintiff, an instruction that if the jury found that the transaction between the plaintiff and defendant was a sale of goods from plaintiff to defendant, they should find a verdict against defendant for their value, less the amount of any counterclaim in his favor, is not objectionable. (*Id.*)

See Contract, 5; Criminal Law, 8, 13, 14, 18, 23, 30, 37-45, 54-60, 66-69; Negligence, 1, 3, 6.

INSURANCE.

1. **FIRE INSURANCE—UNAUTHORIZED APPLICATION FOR POLICY—MEASURE OF DAMAGES AGAINST ASSUMED AGENT.**—In an action by a fire-insurance company to recover damages from one who represented himself to be an agent of a mining company to procure insurance on its property, without having actual authority to do so, the mining company having refused to receive the policy or pay the premium, the measure of damages is not the amount of the unpaid premium on the policy, which had no validity, nor the excess of the premium over the actual cost of insurance, but merely the loss proximately caused to the insurance company by its actual expense in making, issuing, and delivering the policy. (*American Fire Insurance Company of Philadelphia v. Hart*, 678.)
2. **LIFE INSURANCE—CONSTRUCTION OF POLICY—FORFEITURE.**—Where a policy of life insurance clearly called for the prompt payment of the cash portion of the annual premium notes as a condition upon which the company will hold itself liable to pay the whole amount of the policy, with deduction of the balance of the year's premium, and of all notes given for premiums, and its agreement to pay as many tenth parts of the original sum assured as there shall have been complete annual premiums paid, is on the express condition that "all premium notes must be taken up, or the interest

INSURANCE (Continued).

thereon be paid annually in cash, on the date of the maturity of the premium, until the notes are canceled by returns of the surplus, or the whole policy will be forfeited," an additional provision, that "if the said premiums or the interest upon any note given for premiums shall not be paid on or before the days above-mentioned for the payment thereof, then, and in every such case, the company shall not be liable for the payment of the whole sum assured, but only for such part thereof as is expressly stipulated above, and the remainder shall cease and determine," is not inconsistent with the previous provision for forfeiture, and the failure to pay the interest stipulated avoids the policy. (*Madison v. Northwestern Mutual Life Insurance Company*, 475.)

3. **DEFAULT AFTER TEN YEARS—PAYMENT OF FOUR YEARS' PREMIUMS BY DIVIDENDS—MEASURE OF RIGHTS AND OBLIGATIONS.**—Where the only default of the defendant took place after he had had the benefit of ten years' insurance, and occurred at a time when there were outstanding notes unpaid for principal and interest, which were the consideration for the insurance, and of which he paid no part, he could not, on the ground that the premium notes for the first four years had been paid by dividends, claim four tenths of the policy, as if he had defaulted at the end of four years and then paid up the premium notes, whereas he had not in fact then defaulted. His rights and his obligations under the policy must be measured as of the time when the actual default took place, and non-payment of the premium notes then due, or of the interest thereon, forfeited the policy. (*Id.*)
4. **STIPULATION FOR FORFEITURE—PRESUMPTION—VOLUNTARY DEFAULT OF HOLDER.**—A stipulation for a forfeiture in a contract will be enforced, if the rights of the parties cannot be otherwise preserved. The holder of a policy of life insurance will be presumed to understand its various provisions for forfeiture by which he may suffer loss through his own fault, and cannot complain of hardship from a forfeiture when he suffers voluntary default. (*Id.*)

INTEREST. See Judgment, 4; Mortgage, 18; Office and Officers, 10.

IRRIGATION DISTRICT.

1. **INJURY TO LAND—SEEPAGE FROM CANAL OF IRRIGATION DISTRICT—CONSTRUCTION BY CONTRACTOR—STIPULATION FOR JOINT JUDGMENT—FINDINGS.**—In an action for injury to plaintiff's land by seepage of water from the canal of an irrigation district, in the course of construction by a contractor sued jointly with the district, and for an injunction, where the defendants stipulated that if plaintiff recovered judgment at all it should be joint against both defendants, who reserved the right to adjust the responsibility between themselves thereafter, it cannot be objected upon appeal of the irrigation district that it was not responsible for the injury, because the

IRRIGATION DISTRICT (Continued).

contractor was an independent contractor, nor can the district complain of unnecessary findings made in accordance with the stipulation. (*Turpen v. Turlock Irrigation District*, 1.)

2. **CONDEMNATION OF LAND—DAMAGE SUED FOR NOT INCLUDED—PLEADING—PROOF.**—The damage allowed in a suit for the condemnation of land of plaintiff by the irrigation district, taken for the canal, could not have included or anticipated damage to land not taken from seepage due to faulty construction of the canal; and proof of the condemnation proceedings, if not pleaded, was inadmissible to show that such damage was included therein. (*Id.*)
3. **FINDINGS—FAULTY CONSTRUCTION OF CANAL—REPAIRS PENDING SUIT—DISSOLUTION OF INJUNCTION—DAMAGES—APPEAL.**—Where the findings upon sufficient evidence show that the canal was not constructed in the manner suitable for such work, and that its bed where the seepage occurred was of very light and porous sand, through which the water easily percolates, and that such seepage could not be prevented without an artificial bottom, and that since the suit was commenced the defendants had remedied the seepage by repairs, whereupon the temporary injunction was dissolved, and the court rendered judgment for damages found by the jury by reason of the seepage, and for costs, an order denying a new trial will not be disturbed upon appeal. (*Id.*)

JUDGMENT.

1. **FORECLOSURE OF MORTGAGE—CLERICAL MISPRISON IN JUDGMENT—MISNOMER—POWER OF CORRECTION—APPEAL BY MISNAMED DEFENDANT.**—Where a defendant named in the complaint, summons, and default in an action to foreclose a mortgage was by a clerical misprison misnamed in the judgment, by the insertion of an additional initial before the name, the court had the power at any time to correct the clerical misprison appearing upon the face of the record, and its right so to do was not suspended or impeded by an appeal from the judgment taken in the name of the misnamed defendant. (*Fay v. Stubenrauch*, 573.)
2. **EFFECT OF CORRECTION PENDING APPEAL—CURE OF ERROR—AFFIRMANCE OF JUDGMENT—COSTS OF APPEAL.**—The appeal by the misnamed defendant having been taken by a stranger to the record, the effect of the correction of judgment pending the appeal was to relieve the appellant from all liability under the judgment, and to cure the error appealed from. The judgment must therefore be affirmed; but as the error, until corrected, pending the appeal, substantially affected the appellant, the costs of appeal should be allowed. (*Id.*)
3. **JUDICIAL ERRORS NOT AMENDABLE NUNC PRO TUNC.**—The object of entering judgments and decrees as of some previous date is to supply matters of evidence and to rectify clerical misprisions, but

JUDGMENT (Continued).

not to enable the court to correct judicial errors. If the court has not rendered the judgment that it might or should have rendered, or if it has rendered an imperfect or improper judgment, it has no power to remedy such errors by ordering an amendment *nunc pro tunc* of a proper judgment. (Estate of Potter, 424.)

4. **INTEREST—DELAY OF CLERK TO ENTER JUDGMENT—ENTRY NUNC PRO TUNC.**—It is the duty of the clerk to enter judgment immediately when ordered by the court; and where the clerk delayed to enter judgment for nearly two years after the rendition such delay will not be permitted to prejudice the defendant in the allowance of interest. The proper procedure to prevent such prejudice is for the superior court to correct the judgment by causing it to be entered *nunc pro tunc* as of the date when it should have been entered, with allowance of interest from the commencement of the action to that date, and interest on the judgment from that date. (Cutting Fruit Packing Co. v. Canty, 692.)
5. **CORRECTION IN SUPERIOR COURT—COSTS OF APPEAL.**—The judgment should have been corrected by motion in the superior court; and where the only error appearing is an error of the clerk, and not of the court, the costs of appeal will be ordered to be paid by the appellant. (Id.)

See Appeal, 1, 4-6, 9, 11, 12, 15; Building and Loan Associations; Claim and Delivery, 8; Corporations, 3; Costs; Irrigation District, 1; Justice's Court, 2-4; Mechanics' Liens, 6, 10; Mines and Mining, 5-7; Mortgage, 20.

JURISDICTION. See Adoption, 2-4; Estates of Deceased Persons, 26; Justice's Court; Mechanics' Liens, 7, 10; Mines and Mining, 7; Mortgage, 11, 20, 23; Prohibition, 1.

JURY AND JURORS.

TRIAL — QUALIFICATION OF JUROR — CROPPING LEASE — DELIVERY OF CROP.—The fact that a juror was a tenant of the plaintiff under a lease which required him to deliver as rent a certain share of the crop after harvest, which had been delivered for the current year, did not make the juror either the partner or the agent of the plaintiff, and did not disqualify him as a juror under section 602 of the Code of Civil Procedure; and a challenge to such juror for cause was properly denied. (Arnold v. Producers' Fruit Co., 738.)

See Criminal Law, 17; Elections, 6.

JUSTICE'S COURT.

1. **JURISDICTION—WAIVER OF OBJECTION.**—Under the terms of subdivision 4 of section 890 of the Code of Civil Procedure, the objection that the action has not been commenced in the proper township is waived, if not taken at the trial. (McGorray v. Superior Court of San Joaquin County, 266.)

JUSTICE'S COURT (Continued).

2. **WRIT OF REVIEW—INSUFFICIENT PETITION.**—A petition for a writ of review to annul a judgment of the superior court rendered on appeal from the judgment of a justice's court, on the ground that it does not appear from the complaint in the justice's court that the action was commenced in the proper township, which does not allege that an objection to the jurisdiction of the justice of the peace was taken at the trial, or at all, is insufficient. (Id.)
3. **JUDGMENT OF JUSTICE'S COURT—COLLATERAL ATTACK—INSUFFICIENT COMPLAINT—JURISDICTION—REMEDY BY APPEAL.**—The judgment rendered in a justice's court, which had jurisdiction of the subject-matter of the action and of the person of the defendant, cannot be collaterally attacked as void merely because the complaint was insufficient to constitute a cause of action. The sufficiency of the complaint is not a conclusive test of the jurisdiction of the justice's court. It had jurisdiction to determine that question, and to determine it wrong as well as right, and if it committed error, and the complaint was fatally defective, the only remedy was by appeal. (*Brush v. Smith*, 466.)
4. **VALIDITY OF EXECUTION—AMENDABILITY—REPLEVIN OF PROPERTY SEIZED—NOTICE TO SHERIFF.**—In an action to recover the possession of property seized by the sheriff upon execution, where the plaintiff in such action merely notified the sheriff that the execution was issued upon a void judgment, an objection to the validity of the execution merely because it recited that the judgment was recovered "in Justice John Brown's court," of a certain township and county, instead of "the justice's court" of such township, is merely technical and not tenable. The writ was amendable in that respect, and will be accorded the same effect as to acts done under it as if it had been amended. (Id.)

LACHES. See *Mandamus*, 2.

LANDLORD AND TENANT.

1. **GROWING CROP—SURRENDER OF POSSESSION—SALE.**—An instruction to the effect that a tenant who surrenders the leased premises surrenders his right to a growing crop of beets to the landlord, in the absence of an agreement on the part of the landlord to pay for the same, is not objectionable. (*Silva v. Bair*, 599.)
2. **COUNTERCLAIM—DAMAGES FOR ABANDONMENT OF LEASE—NEW LEASE FOR YEARS—EVIDENCE.**—Under a counterclaim in such action for damages for the abandonment by plaintiff of a lease from the defendant where it appeared that a new lease for a long term of years had been made to other parties, the true measure of damages is the difference in the rental value of the premises; and defendant is not entitled to offer evidence of profitable and unprofitable months, and to show that the new lease was made at the beginning of an unprofitable season. (Id.)

LANDLORD AND TENANT (Continued).

3. **COUNTERCLAIM NOT RECOVERABLE—CONSENT TO RESCISSION OF LEASE—SURRENDER TO NEW LESSEES.**—The defendant was not entitled to recover any damages under such counterclaim where it appeared that the lease was rescinded by the consent of the plaintiff and defendant, and possession was surrendered by plaintiff to new lessees, to whom the defendant had leased the premises upon different terms and for a different period prior to such surrender. (Id.)
4. **NOTE FOR RENT—LITIGATED TITLE—INDEMNITY—CONSTRUCTION OF CONTRACT.**—A contract of indemnity given by a landlord to his tenants contemporaneously with an absolute note given by them to him, payable on or before a fixed date, in a sum certain, agreeing "to fully indemnify them in the payment" of the note, which is described as given "in lieu of rent of a certain piece of ground containing one hundred acres more or less, and now in litigation," etc., is to be construed in connection with the note, which it is contemplated shall be paid according to its terms, and the indemnity is against loss to the tenants in case plaintiff should lose the title. (*Prouty v. Adams*, 304.)
5. **ACTION UPON NOTE—DEFENSE INCONSISTENT WITH CONTRACT.**—In an action upon the note, no defense can be interposed which is inconsistent with the contract of indemnity, and a defense that the note was to be paid only on a contingency which had not arisen, such as that defendants would not be required to pay the note unless it was established in court that the plaintiff was the owner of the land, "and that it was not established," is not tenable. (Id.)
6. **PAROL EVIDENCE—UNCERTAIN CONTINGENCY—INDEMNITY AGAINST DOUBLE RENT—CONSISTENCY WITH CONTRACT.**—The contract of indemnity being uncertain as to contingency, parol evidence is admissible to show that it was intended to indemnify the tenants against loss arising from the payment of double rent, if the landlord's title should prove invalid, as such evidence is consistent with the terms of the contract; but parol evidence is not admissible to vary the written contract by showing that the note was not to be paid at all except upon the happening of a certain contingency. (Id.)
7. **ACTION BY TENANT—KILLING OF DOMESTIC ANIMAL—FAILURE OF RAILROAD COMPANY TO FENCE TRACK—CONSTRUCTION OF CODE.**—A tenant has a property right in the land occupied by him within the meaning of section 485 of the Civil Code, giving a right of action against a railroad company for the killing of a domestic animal "upon their line of road which passes through or along the property of the owner thereof," in case of the company's failure to fence the track. Any lawful occupant of the land may maintain the action in case of such failure. (*Walther v. Sierra Railway Company*, 288.)

See *Jury and Jurors; Lease; Unlawful Detainer.*

LANDS. See Public Lands; Swamp and Overflowed Lands.

LARCENY. See Criminal Law, 16-20.

LEASE.

1. **EJECTMENT—CROSS-COMPLAINT—OIL LEASE—RIGHT OF RENEWAL—BREACH OF CONDITIONS—FINDINGS AGAINST EVIDENCE.**—In an action of ejectment, where the defendant set up by way of cross-complaint a right of renewal of a lease of oil-land from the plaintiff, which made a renewal of the lease depend upon the performance of conditions, which the court found, generally and specifically, had been complied with, whereas the evidence clearly showed a breach of the conditions, an order denying a new trial must be reversed for insufficiency of the evidence to sustain the findings. (*Swift v. Occidental Mining and Petroleum Co.*, 161.)
2. **EVIDENCE—USE OF OIL FOR FUEL—CUSTOM—PRACTICAL CONSTRUCTION OF LEASE.**—Where the terms of the lease were not clear as to the right of the lessee to use oil for fuel, though evidence of a custom to that effect among oil prospectors was not admissible, evidence was admissible to show that the plaintiffs acquiesced in the burning of oil in the work of development, and made no demand on account of the oil so used; and such evidence sufficiently establishes a practical construction of the lease by the parties, and sustains a finding according to such evidence. (*Id.*)
3. **CLAUSE AS TO RIGHTS OF MINERS—MISUSE OF WORD.**—A clause in the lease conferring upon the lessees "such other rights and privileges as are vested in mines under the laws of the United States and of the state of California," cannot be treated as meaningless because of the use of the word "mines," instead of "miners," and is intended to confer upon the lessees the rights conferred upon prospectors of mining-ground by the laws of this state and of the United States. (*Id.*)
4. **FORFEITURE OF LEASE—WAIVER—RIGHTS OF LESSOR—BREACH OF CONDITIONS OF RENEWAL.**—The waiver of a forfeiture of the lease for breach of conditions, by not insisting thereupon, could not affect the right of the lessor to defeat a renewal of the lease for breach of conditions upon the faithful performance of which the right of renewal depended. (*Id.*)
5. **DEVELOPMENT—AMOUNT OF EXPENDITURE—CESSATION OF WORK.**—The amount expended in the development of oil under the lease was properly proved; but the amount expended in the beginning of the operations could not excuse a subsequent cessation of work, in breach of a condition of renewal of the lease. (*Id.*)
6. **EVIDENCE—EXPECTATION OF STOCKHOLDERS AND DIRECTORS.**—Evidence was not admissible to prove that the stockholders and directors of the defendant corporation expected and counted upon a renewal of the lease. Without a performance of the conditions of

LEASE (Continued).

the lease, their expectations were of no avail, and with it unnecessary. (Id.)

7. **UNDERSTANDING OF PARTIES—MEANING OF CONTRACT.**—The court properly excluded evidence to show the understanding of the parties touching the meaning of the contract at the time it was executed. (Id.)

See Grant; Landlord and Tenant; Municipal Corporations, 4, 5.

LIFE ESTATE. See Grant.

LIS PENDENS. See Mortgage, 21.

MALICIOUS PROSECUTION.

1. **LEGAL TERMINATION OF SUITS—DETERMINATION OF MERITS NOT REQUIRED.**—In order to maintain an action for malicious prosecution the plaintiff must show that the prosecution or suits complained of as malicious had been legally terminated; but it is not necessary to show that there was a determination upon the merits. The prosecution may be regarded as terminated when it has been disposed of in such a manner that it cannot be revived, so that the prosecutor if he intends to proceed further must institute proceedings *de novo*. (Hurgren v. Union Mutual Life Insurance Company, 585.)
2. **BURDEN OF PROOF.**—The burden of proof is upon the plaintiff not only to show that the action complained of as malicious had terminated, but also to show that it was commenced maliciously and without probable cause. (Id.)
3. **IMPROPER NONSUIT—EVIDENCE—REPEATED DISMISSAL OF UNFOUNDED ACTIONS—APPEARANCE FOR DEFENSE—MALICE—WANT OF PROBABLE CAUSE.**—A judgment of nonsuit will be sustained, if sustainable, upon any ground assigned; but where the pleadings and proof showed that plaintiff applied to defendant for a policy of life insurance for one thousand dollars, and defendant tendered a policy for two thousand dollars, and demanded the premium therefor, which plaintiff refused to pay, and that defendant had brought three several suits for such premium, which plaintiff appeared to defend, and each of which was dismissed by defendant, and there was evidence tending to show that the one who secured the application was defendant's agent, and that the suits were malicious and without probable cause, the granting of a nonsuit for want of proof that such suits were determined upon the merits, and for want of proof as to such agency, malice, and want of probable cause, was improperly granted. (Id.)
4. **ERROR IN STRIKING OUT PARTS OF COMPLAINT.**—Where the court struck out from the complaint some redundant matter, but also struck out matter which was not redundant, and which related to the origin and causes of the suits complained of as malicious,

MALICIOUS PROSECUTION (Continued).

and which left the complaint incomplete and without grammatical connection, the order striking out such proper matter was erroneous. (Id.)

5. **EVIDENCE OF AGENCY—NOTICE OF WITHDRAWAL OF AGENCY.**—A notice published by the defendant while the lawsuit was pending, which stated that the one who solicited plaintiff's policy had been acting as agent for the defendant, but was no longer connected with the company defendant, and which tended to show the previous existence of the agency when the transaction alleged took place, was improperly excluded. (Id.)
6. **LETTER OF PLAINTIFF TO DEFENDANT.**—A letter written from plaintiff to defendant before the third suit was commenced, the receipt of which was acknowledged by the defendant, and which informed defendant of what had occurred, and that the company's agent had raised the policy etc., was admissible to show knowledge of the alleged fraud of the agent, and that the company was put on inquiry as to the facts before the last suit was commenced. (Id.)
7. **SUIT BY COLLECTOR—AUTHORITY FOR DISMISSAL—EVIDENCE IMPROPERLY EXCLUDED.**—Where one of the suits dismissed was brought in the name of a collector, to whom the claim for premium had been assigned for collection, and he was notified that the suit was dismissed, it was error for the court to refuse to allow the plaintiff to ask him at whose request it was dismissed, and whether he had orders therefor, and from whom. (Id.)
8. **UNEXPLAINED DISMISSAL—MALICE AND WANT OF PROBABLE CAUSE.**—If the defendant procured the dismissal of the suit by the collector, without just reason shown therefor, that fact would be some evidence tending to prove malice and want of probable cause. (Id.)

MANDAMUS.

1. **REINSTATEMENT OF POLICEMAN—STATUTE OF LIMITATIONS—DEMURRER.**—An application for a writ of *mandamus* is a special proceeding of a civil nature, which is subject to the rules which govern the limitation of actions. An application, therefore, to reinstate a policeman, which shows on its face that more than seven years had elapsed after his dismissal before the petition was filed, is demurrable on the ground that it was barred by the statute of limitations, whether it be deemed barred by subdivision 1 of section 338 of the Code of Civil Procedure, or by section 343 of that code. (Jones v. Board of Police Commissioners of City and County of San Francisco, 96.)
2. **LACHES.**—The proceeding is also barred by laches. Courts will not allow parties to sleep upon their rights for so many years and then invoke the aid of this prerogative writ. (Id.)

MASTER AND SERVANT. See Negligence, 3-6.

MEASURE OF DAMAGES. See Damages.

MECHANICS' LIENS.

1. CONSTRUCTION OF BRIDGE—USE OF MATERIALS IN TEMPORARY STRUCTURE—PROPERTY OF CONTRACTORS—PROVISION IN CONTRACT.—Materialmen cannot enforce a lien upon a completed bridge for materials which were not furnished to be used, and were not actually used, in the bridge as contracted for and completed, but were furnished and used only in the erection of a temporary structure which formed no part of the completed bridge, but which the contractors were permitted by the contract to provide for temporary support of track, rails, and cars, to prevent damages for delay under the terms of the contract until permanent steel support should be furnished as contracted for, which temporary structure remained the property of the contractors, and was properly removed by them when the bridge was completed. (*Stimson Mill Company v. Los Angeles Traction Company*, 30.)
2. USE OF TEMPORARY STRUCTURE—ACCEPTANCE—VOID CONTRACT—EVIDENCE OF CONSTRUCTION.—The use by the defendant of the temporary structure for the running of trains did not, under the circumstances of the case, furnish any evidence of the acceptance of the bridge as completed; nor was its occupation by it under a void contract conclusive evidence of construction. (*Id.*)
3. LIEN FOR WAGES—LABORERS ON THRESHING-MACHINE—CONTRACT WITH LESSEE—LIEN FOR VALUE.—Where the defendant who made the contract with laborers upon a threshing-machine was a lessee for the defendant appealing, who owned the machine, an objection that the appellant was not liable to a lien for the contract price, but only for the value of the work, is untenable, where the value of the work is alleged and found, and a lien is only given for the value found by the court. (*Clark v. Brown*, 93.)
4. CONTRACT FOR SERVICES AND HORSES—SEGREGATION OF SERVICES.—The fact that a laborer made an entire contract with the lessee for personal services and horses at the rate of four dollars per day does not preclude a lien upon the threshing-machine for the value of the personal services rendered, though no lien could be or was allowed for the work done by the horses. (*Id.*)
5. ASSIGNABILITY OF LIEN.—The lien acquired by a laborer on a threshing-machine under the act of March 12, 1885, (*Stats.* 1885, p. 109,) is assignable. (*Id.*)
6. FORECLOSURE OF LIEN—COSTS AGAINST OWNER DEFENDING—AMOUNT OF JUDGMENT.—The foreclosure in the superior court of the liens of laborers upon a threshing-machine is an action in equity, and costs were properly allowed therein against the owner of the machine, who was a necessary party defendant, and who appeared and made affirmative defenses against the claims of the plaintiff, notwithstanding the amount of the judgment rendered was less than three hundred dollars. (*Id.*)

MECHANICS' LIENS (Continued).

7. **CONCURRENT JURISDICTION.**—In actions of this character, where the claim is for less than three hundred dollars, the superior court has concurrent jurisdiction with that of justices of the peace, and the plaintiff is entitled to costs, whether he seeks relief in one jurisdiction or the other. (Id.)
8. **PREFERRED CLAIMS OF LABORERS FOR WAGES—CONSTRUCTION OF CODE—LIEN NOT GIVEN.**—Section 1206 of the Code of Civil Procedure, giving preferred claims to laborers for their wages, provides a remedy for their enforcement which is exclusive, and creates no lien upon the debtor's property which can be enforced or foreclosed in equity. (Winrod v. Wolters, 399.)
9. **INJUNCTION—DISMISSAL OF ATTACHMENT SUIT—ENFORCEMENT OF LIEN.**—Laborers having preferred claims cannot maintain an injunction to prevent an attaching creditor from dismissing his attachment suit after notice given to such creditor of their preferred claims according to law; nor can they enforce a lien in equity as against such creditor and the debtor and the sheriff who levied the attachment. (Id.)
10. **JURISDICTION OF SUPERIOR COURT—VOID JUDGMENT AND EXECUTION.**—Several laborers, no one of whom has a claim equal to three hundred dollars, and who have no joint interest, cannot give jurisdiction to the superior court by a joinder of their several claims in one action. The superior court had no jurisdiction of the subject-matter of said action, and no power to render a joint judgment in favor of the several plaintiffs. Such judgment is void upon the face of the record, and the execution issued thereupon is void, and was properly quashed. (Id.)

MINES AND MINING.

1. **MINING CLAIMS—EFFECT OF TOWNSITE ENTRY AND PATENT.**—A townsite entry and patent does not carry title to any mine of gold, silver, cinnabar or copper known to be valuable for mining purposes at the date of the entry, or to any valid mining claim or possession then held under existing laws. In respect to a valid mining claim or possession, it is immaterial whether the claim was then known to contain mineral of sufficient value to justify exploration or not. (Callahan v. James, 291.)
2. **ASSESSMENT WORK—FORFEITURE—BURDEN OF PROOF.**—When there has been a valid location of a mining claim, and possession has been maintained thereunder, the burden of proving the facts constituting a forfeiture of the title or right of possession by failure to do the annual assessment work required is upon the party asserting it. (Id.)
3. **ACTION TO QUIET TITLE—FAILURE TO FIND UPON DEFENSE OF FORFEITURE—EVIDENCE IN STATEMENT.**—In an action by the owner of a mining claim to quiet his title thereto against defendants

MINES AND MINING (Continued).

claiming under a townsite entry and patent, where the evidence in the statement is sufficient to justify a finding that the annual work was done by the mining claimants, and there is no evidence to sustain the defense of forfeiture, the failure to find upon such defense will not justify a reversal. (Id.)

4. **EVIDENCE—IDENTIFICATION OF CLAIM—CONTINUANCE OF VEIN IN ADJOINING CLAIM.**—Evidence was admissible to show that the same vein ran through plaintiff's mining claim and a mine belonging to other claimants, which was shown to adjoin plaintiff's mine, as tending to identify the plaintiff's mining claim and its location on the ground. (Id.)
5. **MINING CLAIMS—ACTION TO QUIET TITLE—FINDINGS—SUPPORT OF JUDGMENT—MATTERS OF EVIDENCE—ULTIMATE FACTS.**—In an action to quiet title to mining claims, findings that plaintiff is not the owner or entitled to possession of the property, and that since a certain date the defendant has been the owner, in possession, and entitled to the possession of the property, are sufficient to support a judgment for the defendant; and matters of evidence relating to proceedings in the land office, the citizenship of the parties, and other matters, though proper to be considered by the court in reaching the ultimate facts found by the court, are not required to be passed upon in the findings. (*Gruwell v. Rocca*, 417.)
6. **RIGHT OF PURCHASE UNDER MINING LAWS—CONTEST IN LAND OFFICE—PROVINCE OF STATE COURT.**—Where a contest in the land office of the United States of the right to purchase mining property from the federal government under the mining laws is referred to the state courts to determine the question of "the right of possession," the state court must determine that question by a proceeding authorized by the state laws as though no contest were pending in the land office, and does not concern itself whether or not its judgment can be used in the land office. (Id.)
7. **ERRONEOUS PART OF JUDGMENT—EXCESS OF JURISDICTION—MODIFICATION OF JUDGMENT.**—A part of the judgment in the superior court, declaring that the defendant is entitled to purchase certain named mining claims from the government of the United States, and to receive a patent therefor, is erroneous and in excess of jurisdiction, and will be stricken from the judgment upon appeal. (Id.)
See Nuisance; Public Lands.

MORTGAGE.

1. **FORECLOSURE OF MORTGAGE—SUBSEQUENT GRANT OF RIGHT OF WAY—RELEASES BY MORTGAGEE AFTER GRANT—MODE OF SALE—RIGHTS OF GRANTEE.**—Where subsequent to the execution of a mortgage the mortgagor granted a right of way over the mortgaged lands to a third party, the mortgagee could not, subsequently to that deed, prejudice the owner of the right of way by releases of other por

MORTGAGE (Continued).

tions of the mortgaged premises; and the grantee has the right upon foreclosure of the mortgage to have it explicitly ordered that that portion of the mortgaged premises not covered by the right of way should be first sold, and that the right of way should only be sold in case of deficiency. (*Merced Security Savings Bank v. Simon*, 11.)

2. MORTGAGE OF WIFE'S PROPERTY—JOINT EXECUTION WITH HUSBAND—VERBAL INSTRUCTIONS TO HUSBAND—DELIVERY TO MORTGAGEES.—

Where a wife executed a mortgage of her property jointly with her husband, and delivered it to her husband to be delivered to the mortgagees, but with instructions to exact from the mortgagees a certain promise before delivery of it to them, and he delivered it to them without exacting such promise, or informing them of her instructions, the completeness of the delivery to the mortgagees was not affected by the wife's secret verbal instructions to her husband. (*Alexander v. Welcker*, 302.)

3. MORTGAGE FOR PURCHASE MONEY—PURCHASE OF LAND BY SON—PART PAYMENT—ESTOPPEL.—

Where the note and mortgage of the wife's property were executed by the husband and wife in furtherance of a proposed purchase of land by their son from the mortgagees, who agreed to take the mortgage as part payment, upon delivery thereof by the husband as one of the mortgagors, the mortgagees were justified in closing the contract of purchase, and when they did so the wife is estopped from denying the delivery of the mortgage. (*Id.*)

4. DEED ABSOLUTE—POSSESSION OF MORTGAGEE—ACCOUNTING—COMPENSATION.—

In an action by the mortgagor for an accounting and reconveyance of property conveyed to a mortgagee by deed absolute in form, intended as a mortgage, the mortgagee in possession is not entitled to compensation. (*Moss v. Odell*, 335.)

5. ITEMS OF ACCOUNT—MONEYS RECEIVED TO USE OF MORTGAGOR—MONEYS DISBURSED—STATUTE OF LIMITATIONS.—

Moneys received by the mortgagee in possession to the use of the mortgagor, as the owner of the equitable interest, were properly chargeable to the mortgagee; and the mortgagee should have been credited with moneys paid to the mortgagor and to his use. The statute of limitations as to the accounting only begins to run from the last item charged on either side. (*Id.*)

6. PAYMENT OF NOTE OF MORTGAGEE TO MORTGAGOR—APPLICATION OF PAYMENTS—TIME OF ADVANCES.—

Payments made by the mortgagee to the mortgagor, without direction as to their specific application, are to be regarded as applied on a note of the mortgagee to the mortgagor which was due prior to the mortgage, and the advances by the mortgagee under the mortgage must be regarded as commencing only upon the satisfaction of such note. (*Id.*)

7. DELIVERY OF PAID NOTE MORE THAN FOUR YEARS AFTER MATURITY.—

The subsequent delivery of the satisfied note to the mortgagee

MORTGAGE (Continued).

- more than four years after its maturity is without significance, so far as treating it as discharged by payments of the mortgagee applied thereon is concerned. (Id.)
8. **REJECTION OF CREDITS—GREATER ERROR IN INTEREST—APPELLANT NOT INJURED—AFFIRMANCE OF JUDGMENT.**—Where the rejection of credits which should have been allowed to the mortgagee appellant were more than offset by an error in the interest account in favor of the mortgagee, so that the result of a correct statement of the account would show a less indebtedness on the mortgage than that allowed by the court, the appellant is not injured by the result; and the judgment determining the amount of indebtedness secured by the mortgage will be affirmed. (Id.)
9. **INTERLOCUTORY DECREE — REFERENCE — AFFIRMANCE — PRINCIPLES NOT FIXED—CONSENT TO HEARING BY COURT—REVIEW UPON APPEAL.**—Where an interlocutory decree for an accounting affirmed by this court ordered a reference to take the account against a mortgagee in possession, but did not purport finally to determine the rights of the parties as to the rules or principles upon which the account was to be taken, and by consent of the parties the reference was abandoned, and a hearing had by the judge, the matter and method of the accounting was thereby set at large, and the decision of the court is subject to review in this court. (Id.)
10. **CONSTRUCTION OF FINDING—NON-PAYMENT OF NOTE—LEGAL SATISFACTION.**—A finding as to non-payment of the note from the mortgagor to the mortgagee, taken in connection with the other findings, is construed to mean that there was never any express application of the advances as a payment thereon, and not that the note was not in fact satisfied by the legal application of the moneys advanced to the mortgagee as payments thereon. (Id.)
11. **FORECLOSURE OF MORTGAGE—JURISDICTION OF COURT—ACTION FOR PARTITION.**—In an action for the foreclosure of a mortgage, the court has merely jurisdiction to foreclose the mortgage sued upon and the rights of all parties holding under and subject thereto. It had no jurisdiction to reach over into a separate partition suit, begun prior to the execution of the mortgage by one of the tenants in common who were parties to that suit, and to take control and jurisdiction thereof in the interest of the mortgagee. (Towle Brothers Company v. Quinn, 382.)
12. **DUTY OF MORTGAGEE TO INTERVENE IN PARTITION SUIT.**—The mortgagee having no lien when the action for partition was begun, the plaintiff therein was not bound to make him a party thereto; but it was the right and duty of the mortgagee to intervene in the partition suit, and set up his mortgage lien, and have it adjusted in the partition decree as provided by the code. (Id.)
13. **SALE UNDER FORECLOSURE—ACTION TO REDEEM—EXPIRATION OF STATUTORY PERIOD—LAW OF CASE—PROOF OF SUFFICIENT COM-**

MORTGAGE (Continued).

PLAINT.—In an action to redeem from a foreclosure sale, after the time for statutory redemption had expired, before the offer to redeem had been made, where the complaint was adjudged sufficient upon a former appeal, the right of the plaintiffs to redeem, upon proof of the material averments of the complaint, is the settled law of the case. (*Benson v. Bunting*, 462.)

14. **OFFER TO REDEEM—DENIAL OF RIGHT—FINDINGS—OMISSION TO FIND OFFER.**—Where the complaint alleged an offer to redeem at a certain time, and also alleged that the defendant procured a deed at the commissioner's sale under foreclosure, and ever since has claimed to be the owner of the premises, free from any right of redemption in the plaintiffs, where the offer was put in issue, but the latter averment was admitted and found to be true, it was unnecessary for the court to find in addition that plaintiffs had performed the vain act of offering to do what the defendant denied them the right to do. (*Id.*)
15. **CLAIM FOR TAXES—OFFSET OF RENTAL VALUE.**—It was proper for the court in fixing the amount to be paid for redemption by the plaintiffs to allow an offset of the rental value of the premises while in defendant's possession. (*Id.*)
16. **IMPROVEMENTS MADE AFTER SUIT TO REDEEM.**—The defendant was properly refused the value of improvements made after the suit was commenced to redeem the property, and after defendant knew that the plaintiffs denied his ownership or right to the premises, and knew that he got into possession against the consent of, and in hostility to, the claims of the plaintiffs for redemption. (*Id.*)
17. **INVALID STREET ASSESSMENT.**—The defendant was properly disallowed the amount of an invalid street assessment against the land, which the court found to be void, as being an assessment against too much land. (*Id.*)
18. **INTEREST ALLOWED FOR REDEMPTION.**—Where the court allowed the statutory rate of two per cent per month during the six-months statutory period for redemption, and thereafter the legal rate of seven per cent per annum, the defendant cannot claim that two per cent per month should be allowed until the time of actual redemption, and has no just reason to complain as to the amount of interest allowed after his repudiation of the right of plaintiffs to redeem. (*Id.*)
19. **ACTION TO FORECLOSE MORTGAGE—DISMISSAL—FAILURE TO SERVE AND RETURN SUMMONS.**—An action to foreclose a mortgage, in which there was a failure to serve and return the summons within three years after the commencement of the action, and in which there was no appearance within that period, must imperatively be dismissed under the mandatory provision of subdivision 7 of section 581 of the Code of Civil Procedure. (*Sworfiguer v. White*, 576.)

MORTGAGE (Continued).

20. **LOSS OF JURISDICTION—AMENDED AND SUPPLEMENTAL COMPLAINT BY THIRD PARTY—VOID LIMITATION OF JUDGMENT OF DISMISSAL.**—After the court had lost all jurisdiction of the action by a dismissal thereof, the filing of an amended and supplemental complaint by a third party substituted as plaintiff in the same action, more than four years after its commencement, and the subsequent appearance of one of the original defendants therein, cannot revive the former action so as to change the result; and an amended judgment limiting the former judgment of dismissal of the action to the original mortgagor, upon whose motion it was dismissed, was *ultra vires* and void. (Id.)
21. **FORECLOSURE OF MORTGAGE—PARTIES—UNRECORDED DEED—LIS PENDENS—REPRESENTATION OF GRANTEE BY MORTGAGOR.**—A grantee of the mortgagor who holds an unrecorded deed made prior to the commencement of an action to foreclose the mortgage, in which notice of *lis pendens* has been filed for record, and of which deed the plaintiff had no actual notice when the action was commenced, is not a necessary party to the action, and is bound by the decree rendered therein against the mortgagor, who fully represents the grantee for all the purposes of obtaining jurisdiction. (*Hibernia Savings and Loan Society v. Cochran*, 653.)
22. **SUBSEQUENT KNOWLEDGE IMMATERIAL.**—It is immaterial that subsequent to the commencement of the action it comes to the knowledge of the plaintiff that the mortgagor, prior or subsequent to the commencement of the action, conveyed the mortgaged property to another. The situation is determined by the condition of affairs at the time of the commencement of the action. (Id.)
23. **JURISDICTION OF PERSON OF MORTGAGOR—VOLUNTARY APPEARANCE.**—The voluntary appearance of the mortgagor at any time within three years after the commencement of the action gives jurisdiction of his person, and is equivalent to personal service of the summons and copy of the complaint upon him within that period. (Id.)
24. **RETURN OF SUMMONS—POWER OF COURT.**—Notwithstanding the return of the summons and the fact that the clerk had lost power to issue an *alias* summons, the court had the power either to order the returned summons to be served, or to order a new summons to be issued for service. (Id.)
25. **RIGHTS OF PURCHASER—DEFENSE OF INTERESTS—SPECIAL APPEARANCE—MOTION TO VACATE AND DISMISS.**—A purchaser holding an unrecorded deed *ante litem* has the same right as a purchaser *pendente lite* to appear and ask to be made a party defendant, for the protection of his interests; but by his course in appearing specially before judgment to move to vacate the appearance of the mortgagor and dismiss the action, he in effect declined to become a party; and his subsequent motion after judgment to vacate the judgment, and to set aside the default and appearance

MORTGAGE (Continued).

of the mortgagor, and to dismiss the action on the same grounds on which his former motion was made, was properly denied. (Id.) See Corporations; Judgment, 1.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CHARTER—TAXATION FOR REVENUE—"MUNICIPAL AFFAIR"—CONSTITUTIONAL LAW—POWER OF LEGISLATURE.—A municipal charter framed under section 8 of article XI of the constitution, conferring upon it the power of taxation for purposes of revenue, makes such power a "municipal affair," within the meaning of section 6 of that article, making an exception of "municipal affairs" to the operation of general laws; and such power cannot be withdrawn or abrogated by the legislature. [Beatty, C. J., and Lorigan, J., dissenting.] (Ex Parte Braun, 204.)
2. OPERATION OF POLITICAL CODE—TAXATION FOR REGULATION ONLY.—Section 3366 of the Political Code, enacted in 1901, providing that "boards of supervisors of the counties of the state, and the legislative bodies of the incorporated cities and towns therein, shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license all and every kind of business not prohibited by law," etc., is not applicable to a city governed by a charter framed under the constitution, where such charter confers upon its legislative body the power to impose and collect license-taxes for revenue purposes. [Beatty, C. J., and Lorigan, J., dissenting.] (Id.)
3. SOURCE OF CHARTER POWER OF TAXATION.—The power of cities under freehold charters to raise money by taxation for municipal purposes does not find its source in any grant by the legislature, but has been directly granted by the people of the state by the provisions of the constitution. (Id.)
4. PUBLIC PARK—DEDICATION BY LEGISLATURE—POWER OF LEASE UNDER CHARTER—INJUNCTION BY TAXPAYER—DISSOLUTION.—Where a public park of several hundred acres, at a distance of seven miles from the center of a city, was never dedicated by individuals, but was originally surveyed for a park by the city authorities, and was dedicated as a public park by an act reincorporating the city, and such act and each subsequent charter of the city, including the present charter, approved by concurrent resolution of the legislature, authorized a lease of some portion of the park, and a lease of two and a half acres thereof was made for hotel purposes, as provided in its present charter, in such a way as not in any manner to restrict or interfere with the free use of the waters or grounds of the park by the public, and the lease was for the evident benefit of the public and of the city, a taxpayer cannot sustain an injunction to prevent the execution of such lease; and a temporary injunction issued at his suit was properly dissolved. (Harter v. City of San Jose, 659.)

MUNICIPAL CORPORATIONS (Continued).

5. **CHARTER—CIVIL CODE.**—The injunction was properly dissolved, whether the lease is to be deemed authorized by the express terms of the city charter or is subject to the limitations of sections 711 and 718 of the Civil Code. The lease, if subject to those sections, would be valid as to the period allowed thereby, and only void as to the excess of the period. (Id.)

See Certiorari; Counties; Irrigation District; Schools; Taxation.

MURDER AND MANSLAUGHTER. See Criminal Law, 21-52.**NEGLIGENCE.**

1. **PHYSICIAN—INSTRUCTIONS.**—In an action against a physician, in which the complaint charged the defendant with negligence and want of skill in treating the plaintiff, an instruction as follows, "The defendant in this action is not charged by the plaintiffs with any lack of general skill or competency as a physician and surgeon. This amounts to an admission, and you are bound to hold accordingly, that the defendant was possessed of that ordinary medical and surgical knowledge and skill which the law requires him to possess; there being no degree other than that of ordinary knowledge and skill recognized by law as a standard or applicable as a measure of knowledge and skill in such cases,"—is erroneous. (Baily v. Kreutzmann, 519.)
2. **ACTION FOR DEATH—VESSEL TIED TO PRIVATE WHARF—INSECURE GANG-PLANK—LICENSEE—NEGLIGENCE NOT IMPUTED—INSUFFICIENT COMPLAINT.**—A complaint in an action for death, alleging that the defendant corporation had caused a vessel in its possession to be tied to its private wharf, and had placed an insecure gang-plank from the wharf to the vessel, and that deceased, "having business to perform upon the vessel," lost his life while attempting to board it, as the result of the slipping of the gang-plank, but not stating any employment by or business with the defendant, or permission from the defendant to be upon the premises, does not show that deceased was not a trespasser, but, construing it most favorably, as showing that deceased was a mere licensee, it shows no duty owed to him by the defendant to keep the premises or passageway in a secure condition, and no negligence which can be imputed to the defendant, and does not state a cause of action. (Grundel v. Union Iron Works, 564.)
3. **MASTER AND SERVANT—ACTION BY MINOR—ERRONEOUS INSTRUCTIONS—CREDIBILITY OF TESTIMONY.**—In an action by a minor child to recover damages for injuries sustained while in the employ of the defendant, an instruction that the jury are to judge of the credibility of the testimony introduced before them "by the appearance of the witnesses who have appeared on the witness-stand, and their interest as it may appear in the case," is an erroneous and injurious departure from the plain and explicit language of the law

NEGLIGENCE (Continued).

as embodied in sections 1847 and 2061 of the Code of Civil Procedure. (*Fries v. American Lead Pencil Company*, 610.)

4. **FAILURE TO INSTRUCT CHILD AS TO DANGER—MEASURE OF DAMAGES—FEELINGS OF JURY—INJURY PROXIMATELY CAUSED.**—An instruction to the jury that if they believe from the evidence that the defendant failed to instruct the child as to the danger surrounding the work where he was employed, and that by reason of that failure the child was injured, then it would be their duty to give the child such an amount of damages as they "feel he is entitled to, not exceeding the amount prayed for in the complaint," is prejudicially erroneous, as substituting their emotional feelings of sympathy for the injured child, instead of the measure of damages prescribed by section 3333 of the Civil Code, as the amount which will compensate for the injury proximately caused thereby. (Id.)
5. **INTELLIGENCE OF CHILD—KNOWLEDGE OF DANGER—NEGLIGENCE OF DEFENDANT NOT CONTRIBUTING TO INJURY.**—An instruction that if the jury should find from the evidence that the child was possessed of such intelligence that he knew of and was familiar with the danger surrounding the work, "and that the negligence of the defendant did not contribute to the injury," they should find for the defendant, is clearly erroneous. If the negligence of the defendant did not contribute to the injury, that alone was an end to the defendant's liability, without regard to the other considerations; and if the child knew and was familiar with the danger surrounding the work, no negligence could be imputed to the defendant for failure to instruct him as to the danger; and even if its negligence did contribute to the injury, nevertheless, if plaintiff was himself negligent, there can be no recovery. (Id.)
6. **NEGLIGENCE OF CHILD—ERROR IN REFUSING INSTRUCTION.**—The court erred in refusing to give an instruction requested by the defendant, that "the law requires of a child suing for personal injury care and prudence equal to its capacity, and if you find from the evidence that the plaintiff in this action knew of the character of the machine which caused his injury, and was aware of its dangerous character, and, knowing that fact, went to speak to the person operating said machine, and carelessly and negligently placed his hand on the machine, so that the injury to plaintiff occurred or was inflicted without fault on the part of the defendant, then your judgment will be in favor of the defendant." (Id.)

See Contract, 1.

NEGOTIABLE INSTRUMENTS. See Corporations.

NEWSPAPER.

1. **ESTATES OF DECEASED PERSONS—PROBATE OF WILL—PUBLICATION OF NOTICE OF HEARING—LEGAL "NEWSPAPER."**—The publication of the hearing of the notice of the probate of a will of a deceased

NEWSPAPER (Continued).

person is regulated by section 1303 of the Code of Civil Procedure, which merely requires publication thereof "in a newspaper of the county"; and the Recorder, a legal newspaper published in the city and county of San Francisco, is a "newspaper of the county" within the meaning of that section. (*Estate of Melons*, 331.)

2. **ACT DEFINING "NEWSPAPER OF GENERAL CIRCULATION"—CONSTITUTIONAL LAW—TITLE OF ACT—EXCLUSION OF LEGAL PROCEEDINGS.**—The title of the act of March 25, 1903, (which adds sections 4453 and 4459 to the Political Code, and provides for publications in a "newspaper of general circulation," and purports to define that phrase), is limited exclusively by its terms to publications made by state officers, and commissioners and common councils, boards of trustees, or supervisors in counties, cities, cities and counties, or towns; and the act is unconstitutional under article IV, section 24 of the constitution, in so far as it attempts to include any other class of publications in the body of the act. The act is inapplicable to and excludes all publications made in legal proceedings in the various courts of this state. (*Id.*)

NEW TRIAL.

1. **DELAY IN SERVING STATEMENT—EXCUSABLE NEGLECT.**—The court has authority, upon a proper motion made therefor, to relieve a party moving for a new trial for his failure to serve the statement in time, on the ground of excusable neglect. And where such motion is granted and afterwards the new trial is denied, the appellate court will not presume that the denial was based on the ground of the delay in the service of the proposed statement. (*Baily v. Kreutzmann*, 519.)
2. **SETTLEMENT OF STATEMENT—IRRELEVANT MATTER—DUTY OF JUDGE AND OF COUNSEL.**—It is the duty of the judge in settling a statement on motion for a new trial to strike out of it all irrelevant and redundant matter, notwithstanding the consent of the parties thereto; and the judge should perform his duty fearlessly, and should not, to settle disputes between counsel, order the whole of the reporter's notes inserted, containing a great mass of irrelevant matter. It is the duty of counsel to aid and assist the court so as to have the record present only the material matter necessary to the consideration of the questions raised. (*Arnold v. Producers' Fruit Company*, 738.)
3. **ACTION AGAINST STATE—BOUNTY ON COYOTE SCALPS.**—The provisions of the Code of Civil Procedure relative to new trials apply to actions against the state to recover the bounty on coyote scalps brought under the act of March 23, 1901. The action authorized by that act is not a special proceeding, but an ordinary action for money due, and the rules of law apply thereto which are applicable to ordinary actions. (*San Francisco Law and Collection Company v. State of California*, 354.)

NEW TRIAL (Continued).

4. **MOTION FOR NEW TRIAL—AMENDMENTS OF STATEMENT—CURE OF DEFECTIVE SPECIFICATIONS—DISCRETION OF JUDGE.**—Amendments to the statement on motion for new trial to cure defective specifications, and to embody the question, answer, objection, and ruling in each instance as shown by the record, instead of referring to them only by number, were properly allowed in the discretion of the judge, under section 659 of the Code of Civil Procedure. (Swett v. Gray, 63.)
5. **NOTICE OF MOTION TO AMEND—APPELLANT NOT INJURED.**—The appellant was not injured because not served with notice of the motion to amend the statement, if served with notice of the proposed amendments, and, being present at the hearing of the motion, offered no further amendments, and did not object to the matter proposed to be added, but merely objected generally to any amendment. (Id.)
6. **AMENDMENTS TREATED AS PART OF STATEMENT—ABSENCE OF RE-ENGROSSMENT.**—Where the minutes of the court show that the amendments to the statement were allowed, and that they were before the court when the motion for a new trial was passed upon, and were referred to in the motion, and were considered by the court in passing upon the motion, and were treated both by the court and by the parties as part of the statement, although not re-engrossed, as would have been proper, no injury was done to appellant by the amendments, or by failure to embody them in a re-engrossed statement, and they may be considered as part of the statement. (Id.)
7. **JURISDICTION TO DETERMINE MOTION—PROPER SPECIFICATIONS.**—Where, besides the defective specifications sought to be cured by the allowed amendments, there were other specifications in the engrossed statement amply sufficient to point out the particulars in which it was claimed the court was authorized to grant a new trial, the court clearly had jurisdiction to determine the motion. (Id.)
8. **CONDITIONAL ORDER GRANTING NEW TRIAL—ACTION FOR SEDUCTION—REMISSION OF DAMAGES.**—The court had power in an action for seduction to make a conditional order granting a new trial after judgment for the plaintiff unless the plaintiff should remit a portion of the damages. Such order does not necessarily assume that the order was made on the ground of passion and prejudice having influenced the verdict. (Id.)
9. **GROUND OF ORDER—CONFLICTING EVIDENCE.**—Where the record does not disclose the ground of the conditional order granting a new trial, it may be sustained upon any ground assigned; and where there was conflicting evidence as to whether the defendant was guilty of the seduction charged, as to the previous good character of the plaintiff for chastity, truth, and veracity, and as to the amount of damages, and there were specifications of insufficiency of the evidence to justify the verdict in these respects, it cannot be said that the court erred in making the order appealed from. (Id.)

NEW TRIAL (Continued).

10. **SUFFICIENCY OF COMPLAINT.**—The question of the sufficiency of the complaint cannot be considered on motion for a new trial, where there is no appeal from the judgment. (Id.)
11. **APPEAL FROM CONDITIONAL ORDER—REFUSAL OF REMISSION—EXERCISE OF OPTION.**—Where the appellant by appeal from the conditional order in effect refused to remit any part of the judgment, or to abide by the terms of the order, the appeal was an exercise of the appellant's option, and this court will not upon affirming the order granting a new trial fix any time within which such remission may be made. (Id.)
12. **ORDER DENYING NEW TRIAL—REVIEW UPON APPEAL.**—Upon appeal from an order denying a new trial, without an appeal from the judgment, the sufficiency of the pleadings and of the judgment, as being the legal conclusion from the facts found, cannot be questioned. (*Cummings v. Kearney*, 156.)
13. **ORDER DENYING NEW TRIAL—REVIEW UPON APPEAL.**—Upon appeal from an order denying a new trial, this court is limited in its review to the grounds upon which the new trial was asked, and cannot review the sufficiency of the pleadings or findings to support the judgment, or consider any errors in the conclusions of law or in the judgment. (*Swift v. Occidental Mining and Petroleum Company*, 161.)
14. **DECISION AGAINST LAW—GROUND FOR NEW TRIAL.**—A motion for new trial on the ground that the "decision is against law," is only permissible when a new trial is the appropriate means of correcting the error in the decision, as where omitted findings upon material issues are essential to be made. It cannot be made to correct any conclusion of law from the findings, or any decision against law, for the correction of which a new trial would be vain or useless. (Id.)
15. **SPECIFICATIONS OF INSUFFICIENCY OF EVIDENCE—OBJECT OF RULE.**—Specifications of the insufficiency of the evidence to sustain the findings, which clearly designate the findings and parts of findings, which it is claimed the evidence does not justify, are not objectionable. The object of the rule requiring these specifications is to shorten the statement by excluding everything irrelevant to the specified fact, and to notify the opposing party of the particular finding called in question, that he may see that the statement fairly and fully presents the evidence bearing on that particular matter; and this object accomplished, the statute is satisfied. (Id.)
16. **NOTICE OF INTENTION NOT PREMATURE—SUPPLY OF FINDINGS OMITTED.**—A notice of intention of the defendants to move for a new trial is not rendered premature by the supply of omitted findings by the judge upon his own motion, which were in no way connected with the findings upon which the decree in favor of the plaintiff was founded, and are not questioned by either party. (*Bell v. Staacke*, 186.)

NEW TRIAL (Continued).

17. SPECIFICATIONS OF INSUFFICIENCY OF EVIDENCE—FINDINGS OF PROBATIVE FACTS.—Where probative facts are found by the court, specifications of insufficiency of the evidence to sustain any one of such findings, or any particular contained therein, are sufficient. (Id.)
18. FINDING OF ULTIMATE FACT.—Where the finding is of an ultimate fact, consisting of a conclusion from a number of probative facts, a specification as to the insufficiency of the evidence to sustain such finding is insufficient. [*Per Lorigan, J., and McFarland, J., Shaw, J., Angellotti, J., and Henshaw, J., contra.*] (Id.)
19. IRREGULARITY OF COURT—AFFIDAVIT—RECORD UPON APPEAL—PRESUMPTION.—Where the record upon appeal shows no objection to an affidavit on motion for a new trial as to irregularity in the proceedings of the court by which the defendants were prevented from having a fair trial, and shows no objection presented to the affidavit in the court below, it must be presumed upon appeal that the affidavit was received and considered by the court without objection. (*Pratt v. Pratt*, 247.)
20. INTERRUPTION OF TESTIMONY—COMPELLING WITHDRAWAL OF WITNESS—THREATENED PREJUDGMENT OF DEFENDANT'S TESTIMONY—ERROR OF LAW—IRREGULARITY.—Where the judge trying the cause interrupted counsel for the defendant, while examining the daughter of plaintiff and defendant as a witness for the defendant, who was giving competent testimony, and did in an irregular way control the conduct of defendant's case, and virtually threatened to pre-judge the testimony of the defendant as a witness intending to testify in his own behalf, unless the daughter was withdrawn as a witness against her mother, which threat led to such withdrawal, such action of the court, conceding that it was an error of law, was a prejudicial irregularity, preventing a fair trial to the defendant, which was ground for a new trial, and for reversal of an order denying it. (Id.)

See Appeal, 1, 5, 6, 10, 11; Elections, 4; Eminent Domain, 6; Estates of Deceased Persons, 36; Unlawful Detainer, 4.

NUISANCE.

1. INJUNCTION—MINING DEBRIS—NUISANCE—ACTION BY COUNTY.—A county, as the owner of property injured by the deposit of mining debris in a tributary of the Yuba River, may maintain an action to enjoin the deposit therein of such debris by a mining company engaged in sluice-mining upon such tributary. The public nuisance in such case is also a private nuisance to the county, which it may enjoin. (*County of Yuba v. Kate Hayes Mining Company*, 360.)
2. SITUATION OF COUNTY PROPERTY "ADJACENT" TO RIVER—PLEADING—FINDING—SUFFICIENCY OF EVIDENCE.—Where the complaint alleged and the court found that the county property was "adja-

NUISANCE (Continued).

cent" to the Yuba River, the finding is not against the evidence, where the evidence shows that the property, though not in contact with the river, was sufficiently near thereto to be injured by the deposit of debris thereon by the river in time of high water. The property is "adjacent" to the river when situated near or close to it. (Id.)

3. **RELIEF BEYOND ISSUES—INVASION OF PROPERTY RIGHTS.**—Where the issues tried and determined related solely to the working of defendant's mine by the hydraulic or sluicing process, so as to deposit debris in a tributary of the river, relief granted beyond the issues, to restrict the use of the water of the defendants on any other ground or mine, or forbidding a *bona fide* sale or transfer of the water supply or of the mining property of the defendants, which may be used for any lawful purpose, even though defendants may know that the purchaser will not, in working the same, respect the rights of others, if the sale is not made for that express purpose, is an unwarranted invasion of the rights of property of the defendants. (Id.)

OFFICE AND OFFICERS.

1. **TAX-COLLECTOR—COMMISSION ON LICENSE—TAXES—POWER OF SUPERVISORS—ACTION ON BOND.**—The board of supervisors of a county have no power either to create a license-tax collector or to fix his compensation; and an ordinance conferring the right upon the tax-collector to retain a commission for the collection of license-taxes is void, and constitutes no defense to an action by the county on his official bond to recover the amount of license-taxes retained as such commission, where the law made it the duty of the tax-collector to collect all licenses when he took the office of tax-collector. (County of Butte v. Merrill, 396.)
2. **POWER OF LEGISLATURE—RETROACTIVE LAW—INCREASE OF COMPENSATION.**—The legislature cannot pass a retroactive law to give the collector increased compensation over that fixed by law when his term commenced, nor can any increase in the rate of compensation made after the commencement of his term be held applicable during his term. (Id.)
3. **THEORY OF TRIAL—ANSWER—STIPULATED FACT—WAIVER OF AMENDED COMPLAINT—SUPPORT OF JUDGMENT.**—Where the original complaint included license-taxes between January, 1895, and January, 1898, but it was averred in the answer that the tax-collector had collected the taxes in contest between January, 1895, and January, 1899, and the trial proceeded upon that theory, and the parties made a written statement of facts as to the amount of license-taxes received between the dates alleged in the answer, an amendment of the complaint, as to the time within which the money was collected was waived, and a judgment for the amount stipulated is sufficiently supported. (Id.)

OFFICE AND OFFICERS (Continued).

4. **ACTION ORDERED BY GRAND JURY—PENAL CODE—VALIDITY OF STATUTE—BLENDING OF CODES.**—The grand jury had power, under section 929 of the Penal Code, to order the action commenced by the county to recover the license-taxes collected and not paid over. That section is embraced in the title of the act establishing it, and is not void as not being criminal in its nature, and improperly placed in the Penal Code. A statutory provision otherwise valid is not void because found in any particular code. The codes blend into each other, and no one of them is limited to a particular subject. (Id.)
5. **PUBLIC OFFICE—ABSENCE OF PROPERTY RIGHT—PUBLIC AGENCY—TERMINATION BY SOVEREIGN POWER.**—The right to hold a public office is not a species of property protected by the provisions of the constitution of the United States that no person shall be deprived of property without due process of law. A public office is a mere public agency, which may be terminated by the sovereign power which created it, and the incumbent has no private property in the office which the sovereign power must respect, in a controversy as to the right of removal therefrom. (Matter of Carter, 316.)
6. **CONDITIONS OF INCUMBENCY AND REMOVAL.**—In creating an office the government can impose such limitations and conditions with respect to its duration and termination as may be deemed best, and the incumbent takes the office subject to the conditions which accompany it. It may always be terminated in such manner and by such means as are prescribed by the law which created it, whether it provides for a removal for cause, upon notice, hearing, and a judicial proceeding, or summarily and without a hearing. (Id.)
7. **TEST OF RIGHT TO JUDICIAL INQUIRY.**—The incumbent of an office has no constitutional right to a judicial inquiry and decision upon removal; and if he is removed in strict accordance with the law, it is no objection to the validity of the removal that it was done without notice or investigation, if the law does not require it. The question whether the proceeding for removal is judicial in character depends on whether or not the proceeding prescribed by the law is or is not of that description. (Id.)
8. **REMOVAL BY MAYOR UNDER CHARTER "FOR CAUSE"—SUBSEQUENT NOTICE—REMOVAL NOT JUDICIAL—CERTIORARI.**—Under a city charter giving to the mayor a power of appointment, and a power to remove "for cause" any person holding office by his nomination or appointment, and requiring a subsequent written notice thereof, stating the cause to the person removed, and immediate notice to the council of his action and the reasons therefor, the exercise of the power of removal so given does not involve judicial functions, and the propriety of the removal cannot be reviewed upon *certiorari*. (Id.)

OFFICE AND OFFICERS (Continued).

9. **EFFECT OF IMPROPER REMOVAL—OTHER REMEDIES—NUGATORY ACT.**—If there is an unlawful attempt to exercise the power of removal, other equally efficient remedies are available to the officer. The prescribed mode must be pursued, or the act will be nugatory. If no cause is assigned, or no notice given, or if the cause is, in law, no cause, the attempt to remove will be ineffectual, and may be ignored by those interested. (Id.)
10. **STATE HOSPITAL—BUILDING OF WARD—NOTICE OF MATERIALMEN—LIABILITY OF TRUSTEES—INTEREST AND COSTS.**—The trustees of a state hospital, whose treasurer lawfully holds the custody of moneys due to a contractor for the building of a ward, do not, by joining in the answer of a bank which claimed title to the money by assignment from the contractor, become liable to interest and costs at the suit of materialmen, who by notice of their claims to a particular estimate were entitled thereto as against the bank, where no claim for interest was made in the complaint, and the trustees were enjoined from making payment to the bank, and they did not make any adverse claim to the money in litigation, but were willing to obey any order of the court in the action in relation thereto. (Newport Wharf and Lumber Company v. Drew, 103.)
11. **PAYMENT INTO COURT—DUTY OF PUBLIC TREASURER.**—A public treasurer is not obliged, in case of conflicting claims to money in his hands, to pay it into court in order to avoid interest and costs. His office makes him trustee to hold the money until he can pay it out under lawful authority. (Id.)
12. **LIABILITY OF PUBLIC TRUSTEES—DISCRETION—GOOD FAITH.**—The trustees of the state hospital are public officers, who are guardians of the public money belonging thereto. They have certain discretionary powers, and should not be made answerable for injury or errors of judgment when acting in good faith, within the scope of their authority, without malice, corruption, or sinister motives. (Id.)
13. **PUBLIC OFFICERS—EXTRA CLERK FOR RECORDER—COMPENSATION—PROVISION BY SUPERVISORS—CONSTITUTIONAL LAW.**—Section 3678 of the Political Code, directing the board of supervisors, when necessary, to provide for the payment of such additional clerical force as may be required to enable the county recorder to assist the assessor in the performance of his duties, by annually transmitting to him a complete abstract of all mortgages, deeds of trust, contracts, and other obligations by which any debt is secured, remaining unsatisfied upon the records, is in conflict with section 5 of article XI of the constitution, in leaving the regulation of the compensation of a county officer, in some measure, to the board of supervisors. (Agard v. Shaffer, 725.)
See Counties; Elections.

OPTION. See Vendor and Vendee.

PARENT AND CHILD. See Adoption; Guardian and Ward.

PARKS. See Municipal Corporations, 4.

PARTIES. See Mortgage, 21.

PARTITION. See Mortgage, 11, 12.

PARTNERSHIP.

1. **USE OF FIRM NAME BY INDIVIDUAL.**—An individual may conduct his business under any designation he sees fit; and in the absence of any statute of this state forbidding the use of a firm name as a trade-name by an individual, there is no necessary or conclusive presumption that the words "& Co.," used after a dealer's name, import that he has a partner or partners, or that such title includes more than one person. (*Wiley v. The Crocker-Woolworth National Bank*, 508.)
2. **REPRESENTATION TO BANK—CREDIT TO INDIVIDUAL—SET-OFF OF PERSONAL NOTE AGAINST FIRM ACCOUNT—SECRET PARTNERS.**—Where an individual who commenced business in a firm name stated to the cashier of a bank, with whom he sought to open a deposit account in such name, that he was the sole owner of the business, and never notified the bank to the contrary, and afterward formed a secret partnership with other parties in the same firm name, with the agreement that the names of the other partners should not be disclosed, but should be kept secret, and subsequently borrowed money from the bank in his individual name, the bank is entitled as against such secret partners to set off said note against the deposit account standing in the firm name. (*Id.*)
3. **ESTOPPEL OF DORMANT PARTNER.**—Where a dormant partner permits the business world to believe that the ostensible partner is the sole owner of the business, he is estopped from claiming the contrary against those who have in good faith acted upon such appearance, and cannot be heard to insist that a creditor has not the right to set off his debt against such ostensible partner. (*Id.*)

PATENT. See Swamp and Overflowed Lands.

PAYMENT. See Mortgage, 6, 10; Office and Officers, 11.

PENALTIES. See Gas Companies.

PLACE OF TRIAL.

1. **ORDER CHANGING PLACE OF TRIAL—APPEAL—INSUFFICIENT RECORD—DISMISSAL.**—Upon appeal from an order changing the place of trial, where a bill of exceptions settled without notice has been stricken from the files of the superior court, and by this court from the transcript on appeal, leaving nothing but the notice of appeal and clerk's certificate as to the undertaking, it is the duty of this

PLACE OF TRIAL (Continued).

court to dismiss the appeal of its own motion, without considering a motion to dismiss it for failure of appellant to serve and file points and authorities. (*Tingley v. Otis*, 71.)

2. **ACTION AGAINST CORPORATION—VENUE—PLACE OF PERFORMANCE OF CONTRACT.**—A plaintiff suing a corporation upon a contract has a right to commence the action in the county where the contract was made, or where it was to be performed. The contract is deemed to have been made in the county where the offer of one party was accepted by the other; and the place of performance, where none is expressly named, of a contract of the corporation to repay money advanced to it by the plaintiff bank, is at the bank where it can be found. (*Bank of Yolo v. The Sperry Flour Company*, 314.)
3. **GENERAL RULE AS TO PLACE OF PERFORMANCE.**—In a suit upon the contract of a corporation where no place of performance is expressly stipulated, it ought to be held performable in the place where the circumstances, viewed in the light of pertinent code provisions, indicate that the parties expected or intended it to be performed. (*Id.*)

PLEADING.

1. **CROSS-COMPLAINT—FAILURE TO ANSWER—ADMISSION OF FACTS—APPROPRIATE RELIEF.**—Facts alleged in a cross-complaint are admitted by a failure of the plaintiff to answer, and no proof thereof is required. Where the court found that the plaintiff was in default, and he was denied the right to introduce any proof, or offer any evidence contradicting the allegations of the cross-complaint, if it was the intention of the court to deny plaintiff the privilege of answering, it should have taken the allegations of the cross-complaint as true, and should have granted such relief upon the facts admitted as would be appropriate. (*Murphy v. Murphy*, 471.)
2. **ACTION TO COMPEL RECONVEYANCE—PROOF AS TO AMOUNT PAID.**—Where one object of the cross-complaint was to compel a reconveyance of the land in controversy, and it does not appear therefrom what amount of interest was paid by plaintiff to a bank on defendants' account, proof of that amount was necessary to entitle plaintiff to a reconveyance, though he would be entitled to other appropriate relief upon the admitted allegations. (*Id.*)
3. **INCONSISTENT ACTION OF COURT.**—Where the court, after finding the plaintiff in default, and refusing to permit him to controvert the cross-complaint, required the defendants to prove all of its material allegations, and permitted the plaintiff, as *amicus curiae*, to cross-examine the witnesses, and introduce on the cross-examination letters as controverting the allegations of the cross-complaint, it in effect opened up the default and nullified the previous ruling; and if it was its intention to do so, it should have allowed the plaintiff to answer, and should at least have granted the demand of the defendants for findings. (*Id.*)

PLEADING (Continued).

4. **CONTRACT FOR SALE OF PEACHES—FAILURE IN DELIVERY—ACTION FOR BREACH—DAMAGES—SUFFICIENCY OF COMPLAINT.**—A complaint for damages for breach of a contract to sell and deliver four hundred tons of peaches at thirty dollars per ton, which alleges the execution of the contract, and sets forth a copy thereof, and shows the breach of the contract by refusal to deliver two hundred and seventy and one-half tons thereof, and shows damages sustained by the plaintiff in being compelled to pay twelve dollars per ton more than the price at which defendant agreed to furnish the peaches, sufficiently states a cause of action. (*Cutting Fruit Packing Company v. Canty*, 692.)
5. **WAIVER OF GROUNDS OF SPECIAL DEMURREE—AMBIGUITY REMOVED BY FINDING—SUPPORT OF JUDGMENT.**—Where there was no special demurrer to the complaint, any grounds thereof must be deemed waived; and any variance between the terms of the contract, as alleged in the complaint, and those of the copy attached thereto was only an ambiguity or uncertainty, which was removed by the finding that the copy, as set forth in the complaint, is the contract into which the parties entered. Defective allegations in the complaint are cured by a verdict, and all intendments will be made in support of the judgment thereon. (*Id.*)

See Appeal, 11; Broker, 1, 2; Estates of Deceased Persons, 7; Estoppel; Irrigation District, 2; Mortgage, 20; Negligence, 2; New Trial, 10; Office and Officers, 3; Seduction; Taxation, 1; Trusts, 1, 2, 15, 17; Unlawful Detainer, 1; Water and Water Rights, 5.

POSSESSION. See Claim and Delivery, 1, 2, 8.

PRACTICE. See Appeal; Bill of Exceptions; Bill of Particulars; Certiorari; Costs; Evidence; Findings; Injunction; Instructions; Judgment; Mandamus; Mortgage, 19; New Trial; Place of Trial; Pleadings.

PRINCIPAL AND AGENT. See Agency; Broker.

PROBATE LAW. See Estates of Deceased Persons.

PROHIBITION.

1. **TRIAL OF CAUSE—JURISDICTION—REMEDY BY APPEAL.**—This court will not sustain a writ of prohibition to prevent the superior court from trying a case before it, for alleged want of jurisdiction, there being a remedy by appeal. It is not a sufficient ground for the writ that the trial will be expensive and troublesome. (*Lindley v. Superior Court of Siskiyou County*, 220.)
2. **BENCH-WARRANT TO ENFORCE JUDGMENT AFFIRMED—MINISTERIAL ACT—JUDICIAL ACTS PERFORMED.**—Prohibition cannot be resorted to where there is a plain, speedy, and adequate remedy by appeal,

PROHIBITION (Continued).

and where a judgment of conviction of an offense has been affirmed upon appeal, prohibition will not lie to prevent the ministerial act of a bench-warrant to enforce the judgment. The writ of prohibition is confined to preventive relief, and is not intended as a writ of review, nor to serve the purpose of a second appeal, nor to prevent judicial acts already done, nor to secure the annulment of proceedings already had. (*Valentine v. Police Court*, 615.)

See Counties.

PROSTITUTION. See Criminal Law, 53, 54.

PUBLICATION. See Newspaper.

PUBLIC LAND.

1. **AGRICULTURAL PATENT—CHARACTER OF LAND—ADJUDICATION—COLLATERAL ATTACK BY MINING CLAIMANT—ACTION TO QUIET TITLE—** A United States patent for agricultural land is an adjudication by a tribunal having jurisdiction that the lands were agricultural and not mineral in character, and a mining claimant who did not appear and protest or make any adverse claim against the issuance of the patent cannot collaterally attack the patent in an action to quiet his title to the mining claim against the patentee. (*Paterson v. Ogden*, 43.)
2. **RESERVATION IN PATENT—CONSTRUCTION—RIGHT TO MINE—** A clause in an agricultural patent making it "subject to the right of a proprietor of a vein or lode to abstract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law," if not void, is to be properly construed as only permitting the proprietor of a vein whose apex lies outside of the land, but which penetrates the land on its dip or downward course, to abstract and remove his ore therefrom. It does not confer a right to enter and mine upon the surface of the patented land. (*Id.*)

See Mines and Mining.

PUBLIC OFFICERS. See Office and Officers.

PUBLIC SCHOOLS. See Schools.

QUIETING TITLE. See Appeal, 8; Mines and Mining, 3, 5; Public Lands, 1.

RAILROADS.

1. **RAILROAD TICKET—SPECIAL TRAIN—RULE REQUIRING BERTH—NOTICE TO PURCHASER—ACTION FOR DAMAGES—PAROL EVIDENCE—** A railroad company has the right to run a special train at night for those only who procure sleeping-berths thereon; and a ticket for

RAILROADS (Continued).

such train is subject to a rule making it a condition of the purchase that a berth shall be procured, of which the purchaser had notice, though not expressed in the ticket. In an action for damages for being put off of such train, all of the berths on which had been sold, parol evidence is admissible to prove such rule, and notice to the plaintiff by the ticket-agent that the ticket would not be good for such train, unless he procured a berth thereon. [Shaw, J., and Beatty, C. J., dissenting.] (*Ames v. Southern Pacific Company*, 728.)

2. **TICKET NOT A FULL CONTRACT—RECEIPT FOR FARE—SUBJECTION TO RULES.**—A railroad ticket is not a contract expressing all of the conditions and limitations usually contained in a written agreement; but it is more in the nature of a receipt, evidencing that the passenger has paid his fare for a certain kind of passage on the proper trains of the company, as limited and regulated by its lawful rules, to which a passenger may be required to conform, though not expressed in the ticket. [Shaw, J., and Beatty, C. J., dissenting.] (*Id.*)

See *Landlord and Tenant*, 7.

RAPE. See *Criminal Law*, 13, 55-62.

RECEIVERS. See *Building and Loan Associations*, 2-5.

REDEMPTION. See *Mortgage*, 13-18.

RIGHT OF WAY. See *Mortgage*, 1.

RIPARIAN RIGHTS. See *Water and Water Rights*.

ROADS. See *Highways; Streets, Roads, and Highways*.

ROBBERY. See *Criminal Law*, 63-69.

SALE. See *Contract*, 2-5.

SCHOOLS.

1. **PUBLIC SCHOOLS—MUNICIPAL INCORPORATION ACT—PRIMARY AND GRAMMAR SCHOOLS—LIMITATION OF LEVY—REVENUE FOR HIGH SCHOOL.**—A city of the fifth class, organized under the Municipal Corporation Act of 1883, which limited its power to the establishment of primary and grammar schools, and to the levy of a minimum tax for their support, has additional power, under the subsequent enactment of sections 1669, 1670, and 1671 of the Political Code to establish and maintain a high school within the limits of

SCHOOLS (Continued).

the city; and such limitation of the amount of levy under the Municipal Corporation Act has no application to the matter of providing a revenue for the maintenance of the high school so established. (*Brown v. City of Visalia*, 372.)

2. **LEVY OF TAXES FOR HIGH SCHOOL—ESTIMATE OF HIGH-SCHOOL BOARD.**—It is the duty of the board of trustees of such city to levy a special tax for the support of the high school established therein, upon the estimate of the high-school board, whose duty it is to make such estimate yearly after the establishment of the high school. (*Id.*)

SEDUCTION.

1. **ACTION FOR SEDUCTION—SUFFICIENCY OF COMPLAINT—CHASTITY OF PLAINTIFF.**—A complaint in an action for seduction, which alleges that it was induced solely by the defendant's promise of marriage, and false pretenses of great love, and his urgent importunity, to which she reluctantly yielded, and that she was then a minor, and then was and still is unmarried, and that at the time of the grievances complained of, and at all times prior thereto, she had been chaste and virtuous, avers with sufficient definiteness that she was chaste and virtuous at the time of the actual seduction. (*Sweet v. Gray*, 83.)
2. **AVERMENT OF ABILITY AND WILLINGNESS TO MARRY NOT REQUIRED.**—Where the promise of marriage was only one of the means made use of to accomplish the minor's seduction, and other artifices and pretenses were resorted to for the same purpose, the complaint need not allege her ability or willingness to marry the defendant. (*Id.*)
3. **SPECIAL DEMURRER—MISJOINDER OF CAUSES—AMBIGUITY.**—A special demurrer on the ground that the complaint misjoins a cause of action for seduction and for breach of a contract to marry, and for ambiguity and uncertainty as to whether the cause of action is based on the alleged seduction, or upon the alleged contract to marry, or upon the alleged suffering of the plaintiff, was properly overruled. The promise of marriage is merely set out as one of the inducements of the seduction, and the cause of action and prayer for damages is solely for the alleged seduction, and in no sense on a contract to marry, and there is no ambiguity as to the cause of action. (*Id.*)

STATE OF CALIFORNIA. See Appeal, 2; New Trial, 3.

STATE LANDS. See Swamp and Overflowed Lands.

STATUTE OF FRAUDS. See Broker, 1-4.

STATUTE OF LIMITATIONS.

ACTION ON NOTE—PENDENCY OF INSOLVENCY PROCEEDINGS—DISMISSAL—STATUTORY PROHIBITION.—The pendency of insolvency proceedings instituted by the maker of a note, though subsequently dismissed, operated, under section 62 of the Insolvency Act, and section 356 of the Code of Civil Procedure, as a statutory prohibition to an action upon the note, and the period of such pendency and prohibition is not part of the time limited for the commencement of the action. (*Union Collection Company v. Soule*, 99.)

See *Mandamus*, 1; *Mortgage*, 5.

STATUTES. See *Newspaper*, 2.

STREET ASSESSMENT

1. **STREET IMPROVEMENT—SALE UNDER BOND—INJUNCTION—FINDING—WAIVER OF OBJECTION—ESTOPPEL.**—Upon appeal from an order denying a new trial, in an action to enjoin the sale of plaintiff's lot under a bond for a street improvement, a finding sustained by the evidence that plaintiff and her predecessor in title, by their conduct, waived objection to the improvement, and acquiesced therein and received the benefit thereof, and consented to and ratified the proceedings, and took no appeal to the city council, and did not object to the bond, nor pay or offer to pay the assessment or bond, or any part thereof, and that plaintiff is estopped by said conduct from obtaining equitable relief, is conclusive of the case. (*Cummings v. Kearney*, 156.)

REQUEST FOR IMPROVEMENT AND ASSESSMENT—FRAUD UPON BOND-OWNER.—Where it appears that plaintiff's predecessor in title requested the improvement, and requested the superintendent of streets to deliver the assessment and diagram upon the faith of which the work was done, and acquiesced in all the proceedings without objection to any step, his acts and conduct, if allowed to be questioned, would work a fraud upon the owner of the bond which the law will not tolerate. (*Id.*)

See *Mortgage*, 17.

STREETS, ROADS, AND HIGHWAYS. See *Eminent Domain*, 5, 6; *Highways*.

SUMMONS. See *Appeal*, 12, 13; *Mortgage*, 19, 20, 24.

SURETY.

1. **BOND — SURETYSHIP — COMMISSION AGENT—CONTINUING GUARANTY—REVOCATION AS TO FUTURE TRANSACTIONS.**—A bond conditioned in substance that if an agent of the plaintiff for the sale of sewing-machines on commission should pay all indebtedness then existing, or that he might thereafter in any way incur, to the plaintiff, the

SURETY (Continued).

bond should be void, though technically a contract of suretyship, is as to all future liability, for successive transactions not begun, governed by the same rule as a continuing contract of guaranty, under section 2815 of the Civil Code, and may be revoked at any time as to future independent transactions, with respect to which the consideration is not continuing. (*White Sewing Machine Company v. Courtney*, 874.)

2. **MODE OF REVOCATION—DEMAND FOR RELEASE OF SURETY—RELEASE BY AGENT OF PLAINTIFF.**—A demand by the surety for a release, and the consent thereto by the plaintiff's agent, followed by the execution of a release, is the equivalent, and was in substance a revocation, of the contract by the surety; and the fact that the authority of the agent to make the release was not in writing is not material. No formal release was necessary to terminate the contract. (*Id.*)
3. **FUTURE SALE OF MACHINES.**—The liability of the surety, after such revocation and release, was extinguished in reference to a future sale of machines by the plaintiff to the agent, and the surety cannot be held liable for the price. (*Id.*)

SWAMP AND OVERFLOWED LAND.

1. **STATE PATENT—SWAMP LANDS—BOUNDARY—LOCATION OF RANCHO—SURVEYS—UNITED STATES MAP—REFERENCE TO MAP OF STATE SURVEY—EVIDENCE.**—In determining the boundary of a state patent for swamp and overflowed lands, a map of the government survey of the township, not referred to in the state patent nor shown to have been used or examined by the state officials, is not conclusive as to the location of the eastern boundary of a rancho therein referred to, as being much farther east than as indicated in the state patent, especially where the rancho is not disclosed on the government map to have been marked by any inclosure or visible monuments. Evidence of the application for the state patent showing the description of the land applied for, and of the map of the state survey of the swamp land referred to in the patent, was admissible; and it appearing that the parties acted with reference to that map, it controls any other and inconsistent particulars in the description in case of ambiguous or equivocal calls, under subdivision 6 of section 2077 of the Code of Civil Procedure. (*Miller v. Grunsky*, 441.)
2. **EFFECT OF STATE PATENT—CONSTRUCTION—CONFLICTING CALLS.**—A patent is conclusive between the parties and their privies against any collateral attack; but before it concludes anything it must be construed and its meaning determined, and conflicting calls therein are to be reconciled upon the same principles and by the same rules that govern the construction of other deeds of conveyance. (*Id.*)
3. **EARLIER STATE SURVEYS—MISTAKE IN FINAL CALL FOR RANCHO—VISIBLE MONUMENTS—CHANGE IN SURVEY.**—Earlier state surveys for the same swamp lands, of which the survey for the state patent

SWAMP AND OVERFLOWED LAND (Continued).

was a recompilation, made before the township plat was approved in the federal land office, showing the visible monuments first erected to mark the eastern line of the rancho, according to the first survey thereof for a patent, were properly admitted to show the origin of the description in the state survey and patent, and to explain a mistake in the final call for the rancho therein, as compared with the final survey of the rancho as patented, and as shown on the township map. (Id.)

4. **EFFECT OF PRIOR SURVEY—SUBSEQUENT APPLICATION.**—Where state swamp lands applied for have been previously surveyed, the law does not require a resurvey in the field upon a subsequent application to purchase. (Id.)
5. **TOWNSHIP MAP AT DATE OF STATE PATENT—CALL FOR RANCHO IN PATENT—EXCEPTIONS TO RULE AS TO MONUMENTS.**—A call for the same rancho in the state patent, which was then shown on the township map, to be so located as to give a quantity of swamp land in excess of the state survey of one hundred and seventy-one acres, not paid for, does not show that the rancho was at the date of the patent a monument which inflexibly controls courses, distances, and quantity. This never was an absolute and inflexible rule; but calls for monuments have been made to yield to other calls to effectuate the intention of the parties. The rule, with its exceptions and modifications, is embodied in section 2077 of the Code of Civil Procedure. (Id.)

SURVEY. See Swamp and Overflowed Land.

TAXATION.

1. **ACTION FOR TAXES PAID UNDER PROTEST—ASSESSMENT OF CITY FRANCHISE—FEDERAL FRANCHISES—INSUFFICIENT COMPLAINT.**—A complaint in an action to recover taxes paid under protest, which shows an assessment upon a franchise granted by a city, and avers that plaintiff holds federal franchises which are non-taxable, and is an instrument of the federal government, and that the assessment was void, but does not aver that plaintiff did not receive a franchise granted by such city, does not state a cause of action. (*Western Union Telegraph Company v. County of San Joaquin*, 264.)
2. **POWER OF CITY.**—It cannot be held as matter of law that the city could not grant and that the plaintiff could not receive a franchise which is different from and in addition to the franchises granted to it by the federal government. (Id.)

See Municipal Corporations, 1-3; Schools.

TENDER. See Eminent Domain, 2; Gas Companies; Vendor and Vendee.

TRUSTS.

1. **CONFIDENTIAL RELATION—MOTHER AND SON—PLEADING—SUFFICIENCY OF COMPLAINT—ACTUAL FRAUD.**—In an action to enforce a trust in real property, and to compel a conveyance, a complaint showing the confidential relation of mother and son between the parties, and that the deed was delivered by an aged mother to her son in expectation of her death, and upon the special trust and confidence reposed in him that in case of her recovery he would pay her twenty dollars per month for her support, which he fraudulently induced her to believe that he would do, and that when the deed was delivered he did not intend to pay said sum for her support, and wholly refused to do so, and claimed to own the property, which was of the rental value of sixty dollars per month, states a cause of action for relief on the ground of actual fraud, within the rule of *Brison v. Brison*, 75 Cal. 527. (*Becker v. Schwerdtle*, 386.)
2. **UNCERTAINTY—WANT OF EXPRESS PROMISE—SILENCE—TACIT AGREEMENT—CONSENT TO CONDITIONS OF DELIVERY OF DEED.**—The complaint is not demurrable because the complaint does not allege an express promise by the defendant to make the monthly payments requested by the defendant's mother. It is sufficient that the averment of all the facts connected with the delivery of the deed show a silent acceptance of it under circumstances which made the silence equivalent to a tacit agreement and consent to the conditions which accompanied the delivery of the deed. (Id.)
3. **VOID TRUST TO CONVEY.**—A deed of trust to a son of the trustor, providing for a deed by him to another son of all of the residue of the real property remaining five years after the death of the trustor, and providing that no property or the proceeds thereof shall vest in such other son until the expiration of such period, and until a transfer and delivery thereof to him at the expiration thereof, creates a void trust to convey, under the authority of *Estate of Fair*, 132 Cal. 523. (*Hofeas v. Cummings*, 525.)
4. **VOID TRUSTS OVER.**—Trusts over, to the effect that in the event that the beneficiary named shall die before the expiration of the period fixed, without a testamentary disposition by him provided for in the trust, the property shall then vest in the trustee named or his surviving children, though not void *per se*, are absolutely dependent upon the void trust, and cannot be separated therefrom, and must fall with it. [*Beatty, C. J., Shaw, J., and Angellotti, J., dissenting.*] (Id.)
5. **PROPERTY DISTRIBUTED UNDER WIFE'S WILL—PURCHASE WITH COMMUNITY FUNDS—GIFT TO WIFE—SUPPORT OF FINDINGS.**—In an action by a husband to enforce a trust in property distributed to a daughter under a wife's will, on the ground that it was common property, findings supported by sufficient evidence that the property was paid for with community funds, with the wife's knowledge and consent, for the express purpose on the husband's part of making

TRUSTS (Continued).

- the property a gift to her, and that he directed the deed thereof to be made to her alone, as her separate property, which was done, and that from the date of the purchase until her death they both treated it as her separate property, establish the case against the husband and for the daughter. (*Arkle v. Beedie*, 459.)
6. **DECLARATION OF HOMESTEAD BY HUSBAND.**—The property being the separate property of the wife, the attempt of the husband to declare it as a homestead without her consent was void. (*Id.*)
7. **TRUST—ENFORCEMENT—ADVANCES BY DECEDENT—SECURITY—FINDINGS AGAINST EVIDENCE.**—In an action to enforce a trust, one of the purposes of which was that the trustee should hold the title for the plaintiff, where it appeared from the evidence, without substantial conflict, that the deceased uncle of the plaintiff had advanced large sums of money for plaintiff's benefit, for which plaintiff was indebted to him, and that it was the understanding of the parties that the title was held by the trustee also as security to the uncle for the amount of such advances; findings that the trustee held the title in trust only to convey to the plaintiff, and not as security for plaintiff's indebtedness to the estate of the deceased uncle, were against the evidence. (*Bell v. Staacke*, 186.)
8. **PRACTICAL CONSTRUCTION OF CONTRACT—ACTS AND CONDUCT OF PARTIES.**—Where the acts and conduct of the parties up to the time of the uncle's death, and a sworn statement of the plaintiff in his original complaint, all tended to show that the trust deed to the land was in lieu of antecedent notes and mortgage held by the uncle as security, and that the deed was intended by the parties as security for the indebtedness then due and to become due from the plaintiff to the uncle for further advances, such acts and conduct of the parties show a contemporaneous and practical construction of the contract which must prevail over the subsequent testimony of plaintiff to the contrary. (*Id.*)
9. **WRITTEN AGREEMENT AS TO NOTES AND MORTGAGES—CHANGE OF SECURITY.**—Where a written agreement was made by which notes and a mortgage given upon the sale of land by the plaintiff, were pledged by him to the uncle as security for indebtedness, and the security was changed into land by consent of the parties, in lieu of the notes and mortgages, the land became subject to such written agreement; and the rights of the uncle in the trust property are evidenced thereby. (*Id.*)
10. **ESTOPPEL OF PLAINTIFF.**—Where the plaintiff knew that the title was held in the name of his uncle's confidential clerk, and that the uncle claimed the title as security, and upon faith of such security received the advances made by the uncle, and though informed repeatedly that the uncle was making advances on the property, and never by word or act repudiated the uncle's claim, but insisted on the advances being made, he will be held to the

TRUSTS (Continued).

agreement as thus understood and acquiesced in by him, and believed to exist when he presented his claim against his uncle's estate, and when he commenced the action. (Id.)

11. **EVIDENCE PROPERLY EXCLUDED—DECLARATIONS OUT OF PLAINTIFF'S HEARING—LETTER OF TRUSTEE.**—Declarations made by the uncle and his attorney subsequent to the execution of the deed, out of the hearing of the plaintiff, or of any agent representing him, and a private letter of the trustee written after the uncle's death, which plaintiff had never seen or known of, were properly excluded from evidence. (Id.)
12. **TRUST-DEED—SALE TO PAY INDEBTEDNESS SECURED—INJUNCTION—DISSOLUTION.**—An injunction to restrain a sale under a trust-deed to pay the indebtedness secured thereby was properly dissolved where it appeared by the plaintiff's own showing that the sale would not be made if he should pay the amount secured; and by the defendants' showing that no tender of any sum of money was ever made in payment or satisfaction of the indebtedness, and that plaintiff did not accept an offer of the creditor secured to receive a specific sum in full payment of his claim, except on account of his liability as an indorser of other notes of the plaintiff, which were secured by the deed of trust, and to discontinue the sale on payment of said sum, no part of which was ever paid. (*Meets v. Mohr*, 667.)
13. **EQUITY NOT DONE BY PLAINTIFF.**—He who seeks equity must do equity; and where equity was not done before bringing the action and obtaining the injunction, nor when an opportunity was offered upon the hearing of the motion to dissolve the injunction, the order dissolving it was right and proper. (Id.)
14. **RIGHT OF SALE FOR MONEY DUE—LIABILITY AS INDORSER OF NOTES.**—The trustees under a deed of trust securing money advanced, and also a liability of the creditors as indorser for the grantor of the trust, had a right of sale for moneys due and unpaid to the creditors, and were not compelled to wait until the notes of plaintiff which he indorsed were all paid by the makers or by the creditors, before he could realize on the security held for the money actually advanced. (Id.)
15. **AMENDED COMPLAINT NOT FILED—COUNTER-AFFIDAVIT.**—An amended complaint not allowed to be filed cannot be considered as any part of the showing on which the temporary injunction was granted, and can only be considered in the light of a counter-affidavit on the motion to dissolve the injunction. (Id.)
16. **SUFFICIENCY OF ADVERTISING—POSTPONEMENT OF SALE UPON REQUEST BEFORE SUIT.**—Where the deed of trust provided that the advertisement of sale should be made twice a week in some newspaper published in the city and county of San Francisco at least twice a week for three weeks, and the advertisement was claimed in the amended complaint to be insufficient because published in a paper

TRUSTS (Continued).

not devoted to general news and of small circulation, such objection is not tenable where it appears that the sale was twice postponed at plaintiff's request, and was advertised twice a week for the period of eight weeks prior to the issuance of the injunction. (Id.)

17. **DEMAND—PLEADING—SUFFICIENCY OF ANSWER.**—Where the answer alleges a demand, and also alleges that the defendants have duly performed all the requirements of the deed of trust and agreement on their part to be performed as a condition precedent to the sale of the land, the answer is not objectionable on the ground that it does not allege a demand in writing. (Id.)

See *Estates of Deceased Persons*, 10; *Fraud*, 3, 6; *Wills*, 3.

UNLAWFUL DETAINER.

1. **UNLAWFUL DETAINER BY LESSEE—NOTICE OF DEMAND FOR RENT OR POSSESSION—SERVICE—PLEADING AND PROOF—AFFIDAVITS—NONSUIT.**—In an action of unlawful detainer by a lessee after non-payment of rent, under section 1161 of the Code of Civil Procedure, the service of a three days' notice to make such payment or deliver possession of the premises is a condition precedent to the right to commence the proceeding. It is necessary to aver the service of such notice in the complaint, and if put in issue it must be proved by competent evidence like any other fact in the case. It cannot be proved by affidavits, which rank as hearsay evidence, for the purposes of the trial of issuable facts. If only affidavits of the service were produced, without other evidence, a nonsuit should have been granted. (*Lacrabere v. Wise*, 554.)
2. **ASSIGNMENT OF LEASE BY ASSIGNEE—POSSESSION DELIVERED BEFORE NOTICE TO QUIT.**—An action for unlawful detainer will not lie against an assignee of a lease who had assigned the lease and delivered possession to another assignee before the service upon him of notice to quit. (*Ben Lomand Wine Company v. Sladky*, 619.)
3. **BREACH OF COVENANTS—REMEDY BY ACTION.**—The fact that the first assignee of the lease had been guilty of a breach of covenants of the lease prior to the assignment by him and delivery of the possession under it to another assignee does not render him liable in the summary action of unlawful detainer to damages therefor. In such case the only remedy for such breach is by an ordinary action. (Id.)
4. **SPECIAL VERDICT—ORDER GRANTING NEW TRIAL—INSUFFICIENCY OF EVIDENCE—LACK OF SPECIFICATIONS—ABSENCE OF GROUND AS TO APPELLANT.**—Where the jury found a special verdict, that the appealing defendant had assigned his interest in the lease to a co-defendant prior to the service of notice to quit, and that the co-defendant had taken possession as assignee of the lease prior to such service, an order granting a new trial to the plaintiff as against the appellant cannot be sustained for insufficiency of the evidence

UNLAWFUL DETAINER (Continued).

to justify the special verdict, where there are no specifications thereof in the statement; and where there is no assignment of any error of law material to the special findings, and no other ground for granting the order as against the appellant appears in the record, the order will be reversed as to him. (Id.)

5. **DEFENSE—FRAUD IN OBTAINING DEED AND LEASE—RESCISSON NOT REQUIRED.**—In an action of unlawful detainer for holding over after the expiration of a term of lease, the defendant may set up in defense that the plaintiff procured a deed from the defendant and the agreement of lease by fraud and undue influence; and an answer setting up such fraud and undue influence, and asking for no affirmative relief, need not set up a rescission; nor is it necessary that the defendant must first go into an equity court and have the deed set aside. (*Simon Newman Company v. Lassing*, 174.)
6. **EVIDENCE—SINGLE TRANSACTION.**—The defendant may show as part of the transaction leading up to the lease, and as evidence bearing upon the question of fraud and undue influence in the execution of the lease, that the deed, as well as the lease, was executed, and to show the relation of each to the other as one transaction. (Id.)

VENDOR AND VENDEE.

VENDOR AND PURCHASER—CONTRACT OF SALE—OPTION TO PURCHASE—EXCHANGE OF LAND—TENDER OF DEED—PRIOR WITHDRAWAL OF OPTION—ACTION FOR BREACH.—Under a contract for the sale of land, expressed to be for value received, and conferring an irrevocable option to purchase within fifteen days, and good thereafter until withdrawn, the consideration of which was in fact an oral agreement for the exchange of land, where it appears that the tender of the deed in exchange for the land described in the option was not made until after the lapse of the fifteen days, and until after notice of withdrawal of the option by the vendor, the proposed purchasers cannot thereafter maintain an action for damages for breach of such contract. (*Hay v. Mason*, 722.)

See Broker.

VENUE. See Place of Trial.

WATER AND WATER RIGHTS.

1. **WATER RIGHTS—PERCOLATING WATER—ARTESIAN BELT—RIPARIAN RIGHTS.**—An underground body of water lying in an artesian belt, which does not flow in any defined stream, but is produced by percolation through saturated soil, and is pressed forward by water accumulating from ravines, canyons, and streams above, pressing down into the soil by percolation, is not a watercourse, and is not governed by the law of riparian rights. (*Katz v. Walkinshaw*, 116.)

WATER AND WATER RIGHTS (Continued).

2. **RIGHTS OF OWNERS OF PERCOLATING WATER—REASONABLE USE—INTERFERENCE WITH PERCOLATION.**—Each owner of soil lying in a belt which becomes saturated with percolating water is entitled to a reasonable use thereof on his own land, notwithstanding such reasonable use may interfere with water percolation in his neighbors' soil; but he has no right to injure his neighbors by an unreasonable diversion of the water percolating in the belt for the purpose of sale or carriage to distant lands. (Id.)
3. **MAXIM APPLICABLE.**—The maxim, *Sic utere tuo ut alienum non laedas*, is applicable as between adjoining users of percolating water, whenever justice requires its application. (Id.)
4. **DIVERSION FROM ARTESIAN BELT FOR SALE—INJUNCTION.**—The owners of artesian wells sunk in an artesian belt of percolating water, the waters from which are necessary for domestic use and irrigation of their lands, on which are growing trees, vines, shrubbery, and other plants of great value, are entitled to an injunction to restrain the diversion of the water percolating in the artesian belt, by an owner of land situated in the belt, for the purpose of conveying the same to distant lands for sale, to the irreparable injury of the plaintiffs. (Id.)
5. **PLEADING—SUBTERRANEAN STREAM—INJURY TO ARTESIAN WELLS—SURPLUSAGE.**—Where the complaint for the injunction stated in substance that plaintiffs had wells in their respective tracts, from which water flowed to the surface of the ground, which was necessary for domestic use and irrigation of their lands, and that the defendant by means of wells and excavations on her own lands drew the waters from plaintiffs' lands and conveyed them to distant lands, it states a cause of action for an injunction to restrain the diversion of percolating water; and an averment that the diversion was from an underground stream may be regarded as surplusage. (Id.)
6. **EVIDENCE—IMPROPER NONSUIT.**—Where the evidence supported the cause of action for wrongful diversion of percolating water from the lands of plaintiffs to their irreparable injury, a nonsuit should not have been granted, though the allegation of diversion from a subterranean stream was not proved. (Id.)
7. **APPLICABILITY OF COMMON LAW—VARYING CONDITIONS—CESSATION OF RULE.**—Such parts of the common law of England as are not adapted to our condition, form no part of the law of this state. The common-law, by its own principal, adapts itself to varying conditions, and modifies its rules so as to subserve the ends of justice under different circumstances, and recognizes the principle embodied in section 3510 of the Civil Code, that "when the reason of a rule ceases, so should the rule." (Id.)
8. **RULE AS TO PERCOLATING WATER INAPPLICABLE.**—The common-law rule that percolating water belongs unqualifiedly to the owner of

WATER AND WATER RIGHTS (Continued).

- the soil, and that he has the absolute right to extract and sell it, is not applicable to the conditions existing in a large part of this state, where artificial irrigation is essential to agriculture, and artesian wells in percolating belts are necessarily used for that purpose. (Id.)
9. **DIFFICULTIES IN PREVENTING DIVERSION.**—The difficulties that the courts will meet in securing persons necessarily using percolating water for irrigation by means of artesian wells from the infliction of great wrong and injustice by its diversion, if property right therein is recognized, cannot justify the court in abandoning the task as impossible. The courts can protect this particular species of property in water as effectually as water-rights of any other description. (Id.)
 10. **RULES APPLICABLE—PRIORITY—CORRELATIVE RIGHTS—INJUNCTIONS.**—The rules respecting priority of appropriation and correlative rights in regard to the appropriation and use of percolating water include the right to appropriate any surplus not needed for use by well-owners on their lands, and an equitable adjustment of disputes between overlying landowners, where the supply is insufficient for all, and proper rules relative to injunctions and the remedy at law should be applied to the solution of questions arising in the courts as to such waters. (Id.)
 11. **WATER RIGHTS—PERCOLATING WATER—FINDINGS—SUFFICIENCY OF EVIDENCE—EXCAVATION IN PERMEABLE MATERIAL—DIMINUTION OF STREAM.**—Though the evidence tends very strongly to show that a tunnel and excavation by the plaintiff in permeable gravelly material near the bed of a stream took part of the subterranean flow of the waters of the stream, constituting part of the stream; yet where the findings that the tunnel took only percolating water from plaintiff's land, and that it did not diminish the supply of the water to which the defendants were entitled, were contrary to the evidence, which showed clearly, without conflict, that the stream was substantially diminished thereby to the injury of the defendants, and that the water was taken beyond the lines of the land from which it was taken, the plaintiff had no right to a decree declaring him to be the absolute owner of the water thus taken, or quieting his title thereto. (*McClintock v. Hudson*, 275.)
 12. **UNDERGROUND WATER.**—Under the rule established in *Katz v. Walkinshaw*, ante, p. 116, with respect to percolating water, it is not lawful for one owning land bordering on a stream to excavate in his land, intercept percolating water therein, and apply it to any use other than its reasonable use upon the land from which it is taken, if he thereby diminishes the stream to the damage of others having rights therein. (Id.)
 13. **RIGHTS IN PERCOLATING WATER.**—An owner of land adjoining a stream, who, by excavations in his land, takes percolating water

WATER AND WATER RIGHTS (Continued).

- therefrom, and to that extent diminishes the stream, has no greater rights to the water thus taken from the stream than he would have if the water were taken directly from the stream. (Id.)
14. **DUTY OF COURT—AMOUNT OF DIMINUTION.**—It was the duty of the court to have found from the evidence that the taking out of the water through plaintiff's excavation and tunnel caused a diminution of the stream, and then to ascertain and state the amount of the diminution. (Id.)
15. **WATER RIGHTS—ADJUSTMENT OF RIGHTS IN USE OF DITCH—DOMESTIC USE—FLOW FOR PERIOD OF TIME.**—In the adjustment of the rights of the parties to the use of water flowing in a ditch, where the court finds that the rights of the defendant are subject to the rights of plaintiffs to use the water for domestic purposes and for watering stock, it is not reasonable to decree that plaintiffs are entitled to the continuous flow of any given quantity of water, but there should be an equitable apportionment of such use by allowing a continuous flow for a definite period of time to the plaintiffs entitled to such use. (Craig v. Crafton Water Company, 178.)
16. **RIGHTS BELOW POINT OF DIVERSION.**—The plaintiffs, through whose lands the ditch runs below the point of diversion of the defendant, are entitled to all the water remaining in the ditch below such point of diversion, at the time when plaintiffs' diversion begins. The rights of persons not parties below the plaintiffs' lands cannot be regarded as material as against the defendant. (Id.)
17. **CONSTRUCTION OF DECREE — FINDINGS — AGREEMENT OF PARTIES — SELECTION OF PLACE OF DIVERSION—ACQUIESCENCE.**—A former decree fixing the rights of parties thereto, is to be construed in connection with an agreement found by the court to have been made between the owner of a ranch and parties below it, that he should use all the waters of a creek on the ranch during certain hours each day, as giving such owner the right to select the place of diversion at the highest point on his ranch; and when it appears that such other parties below acquiesced in such selection, and made an agreement as to their time of diversion accordingly, they cannot complain of such selection by the original owner of the ranch, or by the defendant after he acquired title to the higher part thereof, under deeds from the plaintiffs, regardless of the construction of such deeds. (Id.)
18. **WATER RIGHTS—GRANT OF RIGHT TO DEVELOP WATER—COVENANT AGAINST DIMINUTION—ACTION FOR BREACH—INSUFFICIENT DEFENSE.**—In an action by a grantee of the defendants of the right to develop water on defendants' land for use on plaintiff's land, in the sub-surface waters of a creek passing through defendants' land, to recover damages for breach of the covenant by the defendants that if the rights owned by the plaintiff were interfered with by a

WATER AND WATER RIGHTS (Continued).

contemplated diversion of the flow of the stream by the defendants, or their successors or assigns, through a stone ditch above defendants' land, the defendants would grant him a perpetual right to the amount of diminution thereby effected, not exceeding ten inches of water,—an answer that the owners of the stone ditch had the right to the surface flow of the water, and that the diversions complained of as diminishing plaintiff's rights, were made by defendants' grantees by the permission of such owners, constituted no defense to the action upon the covenant made by the defendants, and was properly stricken out. (*Roberts v. Krafts*, 20.)

19. **DEVELOPMENT OF WATER—CONTRACT—APPROPRIATION.**—Under a grant to plaintiff of the right to enter upon defendants' land and "develop any and all water thereon by means of cuts, tunnels, or otherwise," and convey them to plaintiff's land, where the plaintiff did, by means of tunnels and cuts, concentrate and accumulate the waters diffused through a saturated mass of sand, gravel and boulders, constituting the sub-surface flow of a creek on defendants' land which was the only water contemplated by the grant and the covenant made by defendants, such acts constituted a development of the water as provided in the contract, and was also a development of water as generally understood with reference to procuring, controlling, and appropriating subterranean waters. (*Id.*)
20. **ESTOPPEL OF DEFENDANTS—RIGHTS OF OTHER PARTIES.**—Under the terms of the deed and agreement between defendants and plaintiff, under which defendants granted and confirmed the right of plaintiff to the waters developed on his land, and covenanted against diminution thereof, the defendants are estopped from claiming that the waters granted by them, and developed and appropriated by the plaintiff, did not belong to them, but to third parties having rights below their land. (*Id.*)
21. **CHANGE OF POINT OF DIVERSION FROM STONE DITCH—LIABILITY OF DEFENDANTS UNDER CONTRACT.**—The fact that the grantees of the defendants, after diverting the water through the stone ditch as proposed in the contract, subsequently changed the point of diversion to a point above plaintiff's cuts, ditches, and tunnels, is not material to the liability of the defendants under the contract to indemnify plaintiff against loss by diminution of the water to the extent agreed. The gist of the covenant was the diversion of the waters of the creek by the defendants, not to be interfered with by the plaintiff, for which non-interference defendants covenanted that he would be protected against damage. (*Id.*)
22. **SPECIAL DAMAGE—INJURY TO TREES AND FRUIT CROP.**—Where the court found that defendants knew when the contract was made that the ten inches of water contracted for had a peculiar value to plaintiff, inasmuch as his land and orchard were of little value without it, and the orchard was in bearing when the breach of

WATER AND WATER RIGHTS (Continued).

covenant was committed, and there was no other source from which plaintiff could obtain water for irrigation, the court was warranted in making an award of special damages to the extent of the injury suffered to the trees and crops by reason of the failure to furnish the water as agreed. (Id.)

23. **WATER COMPANY—WATER CERTIFICATES IN OTHER COMPANIES—CONSTRUCTION OF RESOLUTION.**—A resolution of a water company providing that upon receipt by it of one water certificate regularly issued on stock of each of two other water companies named, and on payment of twenty dollars, "one share of stock in this corporation" shall be issued, "the water represented by the same to be used upon the land in East Redlands of the person to whom said share is issued, the water represented by said share to be delivered at the highest corner of the land whereon the same is to be used," cannot be otherwise construed than as meaning that each share of the water company's stock represented a proportionate part of all the water of the company, and the words "water represented by the same," must be regarded as referring, not to the shares turned into the company, but to the share of stock issued by it. (Richey v. East Redlands Water Company, 221.)
24. **CONFIRMATION OF CONSTRUCTION—LIABILITY, EXPENSE, AND BENEFIT OF STOCKHOLDERS.**—Such construction of the resolution is confirmed by the liability of each stockholder assumed by the contract of subscription for his proportion of the debts of the defendant corporation and of the aggregate expenses of the water system, and by his presumptive right to a corresponding share of its profits or dividends; and also by the fact that the extra expense of the shares of one of the other water companies was incurred by all of the stockholders of the defendant company, and cannot be supposed to have been incurred for the exclusive benefit of part of them. (Id.)
25. **EQUAL RIGHTS OF STOCKHOLDERS.**—In the absence of provision to the contrary in the certificates of stock of a corporation, or in its resolutions, by-laws, or charter, or other writing, the stockholders are to be regarded as equal in right. (Id.)
26. **USE OF DISTINCT WATER CERTIFICATES ON DISTINCT LANDS—RESOLUTIONS—CONTRACT RIGHTS.**—The habitual use by the defendant water company of the water certificates acquired from one of the other companies on lands below its canal, and those acquired from the other company at greater expense on lands above the canal, and the resolutions of the defendant making such distinct use exclusive, cannot preclude stockholders on lands below the canal, whose supply of water has failed, from asserting their contract rights to a proportionate share of the whole water owned by the defendant. (Id.)
27. **ADVERSE USER—ESTOPPEL.**—The use of the water delivered to some stockholders cannot be regarded as adverse either to the other stock-

WATER AND WATER RIGHTS (Continued).

holders or to the company. Nor could the stockholders, whose lands were below the canal, have any right to complain, so long as they were supplied with the amount of water to which they were entitled; and they are not estopped by acquiescence from assertion of their right to their proportionate share of water, which the company had ceased to supply them. (Id.)

See Irrigation District.

WAY. See Right of Way.

WILLS.

1. **ESTATES OF DECEASED PERSONS—DISTRIBUTION—CONSTRUCTION OF WILL—TENANCY IN COMMON OF DEVISEES—PRIOR DEATH OF DEVISEE—LAPSE OF BEQUEST.**—Under the will of a deceased person, bequeathing all of his real and personal property to two devisees named, no joint tenancy is created or devise made to a class, with any right of survivorship, but the will creates a tenancy in common in the devisees; and where one of the devisees named died prior to the death of the testator the bequest to such devisee lapsed, and the half-interest devised to her should be distributed to the heirs at law of the testator. (Estate of Hittell, 432.)
2. **ESTATES OF DECEASED PERSONS—PETITION FOR PARTIAL DISTRIBUTION—CONSTRUCTION OF WILL AND CODICIL—REVOCATION OF REQUEST.**—Where by the express terms of the codicil to a will of a deceased testator a desire was expressed to revoke and change some of the former devises and legacies, and that the codicil shall control the provisions of the former will, and the codicil, after specific gifts, disposes of the whole residue of the estate to certain persons named, of whom a petitioner for partial distribution of the estate is not one, though such petitioner was named as one of the persons entitled to a portion of the residue in the original will, the bequest thereof in the original will is expressly revoked by the codicil, and the petitioner has no interest in the estate. (Estate of Scott, 435.)
3. **ESTATES OF DECEASED PERSONS—CONSTRUCTION OF WILL—CARE OF BURIAL LOT BY MASONIC LODGE—DEVISE TO HUSBAND—PREGATORY WORDS—TRUST.**—Where a wife devised land to her husband in fee simple, with an expression of "desire" and "request" that he should convey it to a Masonic lodge, "in such manner and at such times as he may deem best," and that he should out of the rents, issues, and profits of other land devised to him for life invest the sum of one thousand dollars in some satisfactory security and transfer the same to the said lodge, and that such conveyance and transfer should be made in such manner as to impose the obligation upon the lodge to care for her burial lot; and where the will also provided that, in case of the death of her husband before her own death, the land devised to her husband "in fee simple, with the request that it be conveyed to the Ventura Lodge," was

WILLS (Continued).

devised to her executors in trust for the same purpose,—the trust so created, taken in connection with the devise to the husband, indicates that the precatory words accompanying the devise to him were not intended to import a trust or charge upon the land in his hands, such as could be enforced in a court of equity. (*Kauffman v. Gries*, 295.)

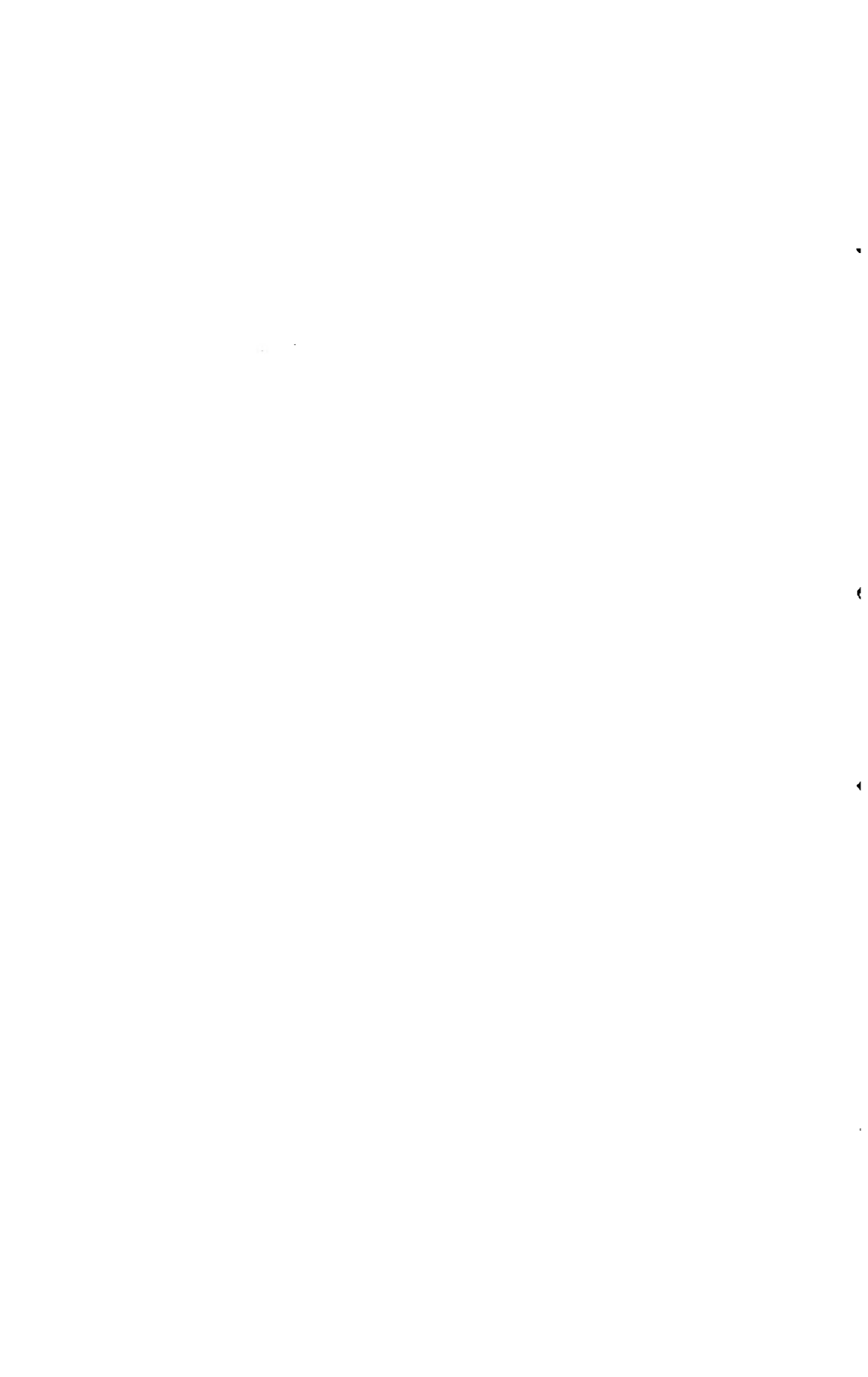
4. **DECREE OF DISTRIBUTION—ERRONEOUS JUDGMENT.**—There is no warrant in the will for a judgment in favor of the lodge for one thousand dollars against the husband of the testatrix; and where the decree of distribution of her estate distributed the land to the husband, without imposing any charge thereon, and also distributed one thousand dollars to the lodge, under the conditions contemplated by the will, the rights of the lodge are limited by such decree; and a judgment for said sum in favor of its members against the husband must be reversed. (*Id.*)

See Assignment; Estates of Deceased Persons.

WITNESSES. See Broker, 6; Evidence.

WRIT OF REVIEW. See Certiorari.





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